JIBC IN SERVICE: 10-8

A PEER READ PUBLICATION

A newsletter devoted to operational police officers in Canada.

THE CHARTER: GLANCING BACK WHILE LOOKING FORWARD

The criminal justice system is alive and active in Canada. According to the most recent statistics, there were almost 400,000 adult criminal cases before the courts involving more than one million charges.[1] Cases investigated by police but not prosecuted would substantially increase the number of people caught up in the criminal justice net. In 1982, the enactment of the *Charter* forever changed the landscape of the criminal justice system. It altered the way in which the police investigate, prosecutors prosecute, defence lawyers defend, and judges adjudicate.

Generally speaking, there are two broad phases within the criminal justice system; the *investigative phase* as well as the *adjudicative phase*.[2] The courts are tasked with balancing individual rights against society's interest in effective policing.[3] These countervailing or competing interests are also recognized by legal scholars in two well known criminal process models; the *crime control* model and the *due process* model.[4]

The crime control model has been described as resembling an "assembly line"; police are concerned mostly with efficiency and factual guilt and investigate with the view that the trial is not of primary importance.[5] Police should be trusted, given broad investigatory powers, and this model does not worry about the odd rogue officer. Since factual guilt is the primary concern, the goal is to move the guilty to conviction and punishment. The ends justify the means.

The due-process model, on the other hand, is seen as an "obstacle course", where defence lawyers, concerned mostly with fairness and legal guilt, may argue an accused's rights have been violated and seek to ensure police are properly restrained during the investigative phase.[6] The due-process model recognizes the justice system's propensity for human abuses and people, particularly the disadvantaged, are vulnerable given the superior power of the state. This system is also interested in the means and not just the ends. How the police "catch criminals" is important.

Throughout the investigative process the *Charter* (in theory at least) imposes restraints or limits on police powers, presumably protecting people against police abuses. Nowhere do law enforcement's crime control goals and individual rights collide more frequently than in the area of criminal investigation, where the *Charter* is "animated at virtually every stage of police action".[7] The *Charter* does not, however, impose obligations on the citizen nor grant police powers. The challenge for the police then, is to enforce the law by negotiating the area where personal freedoms and the public interest intersect. In doing so, the police, guided by the courts, must often translate abstract, constitutional guarantees into daily reality. Police powers to detain, search, and interrogate are curtailed by the rights found in ss. 7, 8, 9, and 10 of the *Charter*. These protections provide some safeguards for people from police misconduct and presumably bring an appropriate balance between the state's superior and coercive power and the constitutional rights of the individual.

The effect of the *Charter* on Canada's legal landscape has been profound.[8] There is no doubt that it has had a significant impact on Canada's criminal justice system. Just as there have been successes attributable to this constitutional document there have also been failures or areas where it has come up short. Exactly where the *Charter* is headed has yet to be decided, but there is no doubt that it will no easy task for police officers to navigate.

Endnotes at p. 2.

Highlights In This Issue

National Library of Canada Cataloguing in Publication Data

Main entry under title:

In service: 10-8. -- Vol. 1, no. 1 (June 2001)

Monthly

Title from caption.

"A newsletter devoted to operational police officers across British Columbia."

ISSN 1705-5717 = In service, 10-8

1. Police - British Columbia - Periodicals. 2. Police - Legal status, laws, etc. - Canada - Cases - Periodicals. I. Justice Institute of British Columbia. Police Academy. II. Title: In service, 10-8. III. Title: In service, ten-eight.

Unless otherwise noted all articles are authored by Mike Novakowski, MA, LLM. The articles contained herein are provided for information purposes only and are not to be construed as legal or other professional advice. The opinions expressed herein are not necessarily the opinions of the Justice Institute of British Columbia. "In Service: 10-8" welcomes your comments or contributions to this newsletter. If you would like to be added to our electronic distribution list e-mail Mike Novakowski at mnovakowski@jibc.ca.

[1] Statistics Canada, 2010, Adult Criminal Court Statistics, 2008/2009, 85-002-XPE, Vol. 30, no. 2.

[2] James Stribopoulos, Has the Charter Been for Crime Control? Reflecting on 25 Years of Constitutional Criminal Procedure in Canada (2009)

[3] *R. v. Mann*, [2004] 3 S.C.R. 59, 2004 SCC 52 at para. 15 (investigative detention). See also *R. v. Hebert*, [1990] 2 S.C.R. 151 (pre-trial right to silence), *R. v. Kang-Brown*, 2008 SCC 18 (dog sniff search), *Cloutier v. Langlois*, [1990] 1 S.C.R. 158 (search incident to arrest), *R. v. Evans*, [1996] 1 S.C.R. 8 (knock-on search), *R. v. Clayton*, [2007] 2 S.C.R. 725, 2007 SCC 32 (investigative road-block), *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83 (strip searches), *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 (search and seizure).

[4,5,6] Kent Roach, Due Process and Victims Rights (Toronto: University of Toronto Press, 1999) at 12.

[7] *R. v. Mann,* [2004] 3 S.C.R. 59, 2004 SCC 52 at para. 16.

[8] Jamie Cameron and James Stribopoulos, "Preface" in Jamie Cameron & James Stribopoulos, eds., The Charter and Criminal Justice: Twenty Five Years Later (Markham: LexisNexis Canada Inc., 2008) iii.

JUSTICE INSTITUTE of BRITISH COLUMBIA LIBRARY

WHAT'S NEW FOR POLICE IN THE LIBRARY

The Justice Institute of British Columbia Library is an excellent resource for learning. Here is a list of its recent acquisitions which may be of interest to police.

CPR and AED.

Alton Thygerson, Steven M. Thygerson, medical writers; Benjamin Gulli, Gina Piazza, medical editors; American College of Emergency Physicians.

Sudbury, MA: Jones and Bartlett Learning, [2011], c2012.

RC 86.7 T463 2011

Creating your strategic plan: a workbook for public and nonprofit organizations.

John M. Bryson, Farnum K. Alston.

San Francisco, CA: Jossey-Bass, c2011.

HD 30.28 B788 2011

Crime and elder abuse: an integrated perspective.

Brian K. Payne.

Springfield, IL: Charles C Thomas Publisher, c2011.

HV 6626.3 P39 2011

Designing and conducting mixed methods research.

John W. Creswell, Vicki L. Plano Clark.

Los Angeles, CA: SAGE Publications, c2011.

H 62 C696 2011

Ethics for the public service professional.

Aric W. Dutelle.

Boca Raton, FL : CRC Press, c2011.

JL 111 E84 D88 2011

The excellent online instructor: strategies for professional development

Rena M. Palloff, Keith Pratt.

San Francisco, CA : Jossey-Bass, c2011.

LB 1044.87 P338 2011

Families count : profiling Canada's families IV.

Ottawa, ON: Vanier Institute of the Family, c2010.

HQ 560 P78 2010

(Shelved in Reference Statistics Section)

First aid, CPR, and AED Standard.

Alton Thygerson, medical writer; Benjamin Gulli, medical editor; Gina Piazza, medical editor; American College of Emergency Physicians.

Sudbury, MA: Jones & Bartlett Learning, [2011], c2012.

RC 86.7 T473 2011

For better or for worse : a practical guide to Canadian employment law.

Randall Scott Echlin, Christine M. Thomlinson; with foreword by Frank Iacobucci.

Aurora, ON: Canada Law Book, c2011.

KE 3109 E244 2011

Glimpses of light [videorecording]

[Vancouver, BC]: Orca Productions, 2010; Vancouver, BC: Moving Images

Distribution [distributor]

1 videodisc (ca. 17 min.) : sd., col. ; 4 3/4 in. + discussion guide.

This DVD does not have scene selection. "This film is an initiative of the Cultural Society working group of the First Nation, Métis and Inuit Advisory Committee of the Mental Health Commission in collaboration with the Mood Disorders Association of Canada and the Native Mental Health Association." - Container. Different voices from diverse cultural backgrounds share life stories about the paths travelled while navigating their experience of mental illness. Their messages are meant to serve as a catalyst for ongoing discussion to deepen our understanding of needs and experience of people who experience mental illness and, in particular, Aboriginal people and their families. They offer suggestions for a more holistic system that includes an approach of respect, not blame, and an understanding of their need for cultural reconciliation. A health care provider comments that respect for the patient's personal experience is an essential first step along the path to healing.

RC 451.5 I5 G554 2010 D1230

Perseverance.
Margaret J. Wheatley.
San Francisco, CA: Berrett-Koehler Publishers, c2010.
BJ 1533 P4 W43 2010

Research methods in criminal justice and criminology: an interdisciplinary approach.
Lee Ellis, Richard D. Hartley, and Anthony Walsh.
Lanham, MD: Rowman & Littlefield Publishers, c2010.
HV 6024.5 E43 2010

The stranger in the mirror : dissociation--the hidden epidemic.
Marlene Steinberg, Maxine Schnall.
New York, NY: Cliff Street Books, c2001.
RC 553 D5 S738 2001

Teaching for experiential learning: five approaches that work.
Scott D. Wurdinger and Julie A. Carlson.
Lanham, MD: Rowman & Littlefield Education, c2010.
LB 1027.23 W86 2010

Tell to win: connect, persuade, and triumph with the hidden power of story.
Peter Guber.
New York, NY: Crown Business, c2011.
HF 5386 G83 2011

Telling ain't training.
Harold D. Stolovitch and Erica J. Keeps with contributions from Marc J. Rosenberg.
Alexandria, VA: ATSD Press, c2011.
HF 5549.5 T7 2011

The truth about supervision: coaching, teamwork, interviewing, appraisals, 360 assessments, delegation and recognition.
by Anne O'Brien Carelli.
Springfield, IL: Charles C Thomas, c2010.
HF 5549.12 C355 2010

What parents need to know about teen risk taking: strategies for reducing problems related to alcohol, other drugs, gambling and Internet use.
David A. Wolfe ... [et al.].
Toronto, ON: Centre for Addiction and Mental Health, c2011.
RJ 506 R57 W43 2011

Zotero: a guide for librarians, researchers, and educators.
by Jason Puckett.
Chicago, IL: Association of College and Research Libraries, 2011.
PN 171 F56 P83 2011

CONSTELLATION, NOT ISOLATION, JUSTIFIES DOG SNIFF

R. v. Chehil, 2011 NSCA 82

The accused flew overnight on a Westjet flight from Vancouver to Halifax. He had no reservation but simply walked up to the ticket sales counter by himself and paid cash. He checked one locked suitcase. Meanwhile, a special police team, tasked to detect the flow of illegal drugs into the Halifax International Airport, consulted with local airline agents to identify travelers displaying suspicious patterns. After examining the airline's manifest, police noticed that the accused matched several established criteria. In their view, this collectively provided enough grounds for a dog sniff search, including:

- The accused was travelling on a flight from British Columbia, which the police knew as a source province for drugs.
- The ticket was bought with cash. The officers knew from their experience and training that drug couriers are paid by suppliers in cash and use cash to purchase their tickets to avoid a paper trail.
- The accused was flying on an overnight flight. The use of overnight or red-eye flights are typically preferred by drug couriers because of the reduced police presence as well as the lower cost of such flights.
- The flight was a one-way flight with only one stop over, but no change of aircraft. This meant that the luggage loaded at the place of origin

would remain in the plane until it reached its destination.

- The accused was travelling alone. In the context of drug investigations travelling alone means that fewer people know about the travel arrangements which reduces the risk of discovery either by the police or by other criminals who might want to take the product. Plus, travelling alone is less expensive than going with another person.

When the flight arrived in Halifax, the accused's bag, along with nine other randomly selected bags, was set aside for sniffing by a police dog in a secure area of the airport. Police directed their Labrador retriever, which was specially trained to detect the scent of drugs, to sniff the bags. The dog indicated on the accused's suitcase. When the accused retrieved his suitcase from the public carousel, he was arrested, taken to a private room, and his bag was forced open and searched. Three kilograms of cocaine was found and the accused was charged with possession for the purpose of trafficking.

At trial in Nova Scotia Supreme Court the accused argued that the dog sniff and subsequent search of his suitcase as an incident to the arrest were unlawful. The trial judge agreed. As for the sniff search, the judge felt the police did not have the requisite reasonable suspicion to justify using the dog, but rather were merely acting on an "educated guess." He found that the factors relied upon by police, even when considered cumulatively and in their totality, did not provide objectively reasonable suspicion that the suitcase contained drugs. In his view, only the cash purchase of a ticket at the last minute could perhaps be viewed as suspicious, but the rest of the factors were equivocal and clearly had innocent explanations. He also noted that the police could have taken additional steps to buttress their grounds for suspicion, such as speaking to the accused, determining the reason for the cash purchase, the one way travel, or why he was travelling alone. "Exculpatory, neutral or equivocal information would appear to not have been considered," said the judge. "The cumulative effect of the various factors did not ... establish a reasonable suspicion to believe that the [accused] was involved in criminal activity." Since the sniff search was unlawful, the grounds for arrest evaporated. "The search was not based on the reduced standard of reasonable suspicion but rather on speculation," said the judge. "The search was not lawful and the arrest which followed was unlawful." The judge was not satisfied that forcing open the suitcase was a search incident to a lawful arrest. The search was unreasonable and the evidence obtained from the s. 8 *Charter* breach was excluded under s. 24(2). The accused was acquitted.

> "[T]o justify the sniff search they required only a 'reasonable suspicion' that the suitcase contained illegal drugs."

The Crown challenged the trial judge's ruling to the Nova Scotia Court of Appeal arguing, in part, that both the sniff search and the search of the suitcase incident to arrest were lawful. In framing the question to be answered in this case, Chief Justice MacDonald, authoring the Court's unanimous judgment, put it this way:

> [T]he police had to meet certain standards to justify their actions. For example, to justify the sniff search they required only a "reasonable suspicion" that the suitcase contained illegal drugs. This is because such a search would be less intrusive. However, to justify [the accused's] arrest and incidental search of the suitcase, which is obviously more intrusive, the police required the higher standard of "reasonable and probable grounds" to believe that the suitcase contained illegal drugs. [para. 22]

Sniff Searches

The police are justified in using a drug dog to sniff search a traveller's luggage as long as they act on a "reasonable suspicion" that a crime is being committed. A reasonable suspicion is more than a hunch but less than the reasonable and probable grounds standard. In addition to the personal opinion of the police officer, the reasonable suspicion standard imports an element of objectivity. A court must be able to make an independent assessment of the facts upon which the police officer based their suspicion.

In this case, the Court of Appeal disagreed with the trial judge that the police lacked the requisite reasonable suspicion to use the drug sniffing dog:

> [W]hen I view the "constellation of objectively discernable facts", I see reasonable grounds for suspicion. In other words, I see ample uncontested evidence to justify a reasonable expectation that [the accused] was engaged in criminal activity. To be specific, consider the following evidence all of which, based on police intelligence, is consistent with the flow of illegal drugs:
>
> - a Vancouver-Halifax flight
> - a walk up passenger travelling alone and paying cash
> - the last ticket purchased for that flight
> - just one relatively new suitcase that was locked
> - an overnight flight
> - one-way ticket
>
> These factors, in my respectful view, converge to establish the requisite reasonable grounds to suspect. In reaching this conclusion, I am not overlooking the fact that each of these factors considered in isolation offers an innocent explanation. For example, many innocent people travel alone. Many may use overnight flights to save money. A certain percentage may walk up without a reservation. No doubt some still pay cash. Not everyone has an old suitcase.
>
> However, we must step back and look at the "constellation" of factors. In other words, our task is not to consider each factor in isolation to determine if there may be innocent explanations. ... [I]nstead of looking for a constellation of factors, [the trial judge] appeared to look at each in isolation and in doing so, dwelled on the corresponding innocent explanations. [paras. 36-38]

Chief Justice MacDonald found it was a mistake for the trial judge to consider that the police ignored the potential litany of innocent explanations. Although there were innocent explanations for each factor relied upon by the police, the test was whether "these factors coalesced into reasonable suspicion, despite a potential innocent explanation for each." As for the police taking additional steps to support their grounds for suspicion, they could have, but it was not necessary. "Could the police have done more?" asked Chief Justice MacDonald. "By all means. However, again, that is not the question. Instead, the question is whether in this case the police did enough to establish a reasonable suspicion. In my view they did and, respectfully, the judge erred in concluding otherwise." Thus, the officers had the requisite reasonable suspicion to direct the luggage sniff.

The Arrest and Suitcase Search

Since there was no warrant to search the suitcase, the search was presumptively unreasonable. But the search could nonetheless be reasonable if the police had reasonable grounds to arrest the accused, believing that the suitcase contained illegal drugs. The police dog was trained to detect the smell of drugs and its handler testified to its reliability. The dog's positive indication on the suitcase along with the accused's other suspicious travel patterns provided the necessary grounds to justify the arrest. "I conclude that the police, armed with the suspicious indicators justifying the sniff search, together with the added results from this search, had reasonable and probable grounds to believe that [the accused] was in possession of illegal drugs," said the Chief Justice. "His arrest was therefore justified, thus making it reasonable for the police to search his suitcase." There were no *Charter* breaches in this case and therefore it was unnecessary to conduct a s. 24(2) analysis.

> "These factors ... converge to establish the requisite reasonable grounds to suspect. In reaching this conclusion, I am not overlooking the fact that each of these factors considered in isolation offers an innocent explanation."

The Crown's appeal was allowed and a new trial was ordered.

Complete case available at www.canlii.org

2010 POLICE REPORTED CRIME

In July 2011 Statistics Canada released its "Police reported crime statistics in Canada, 2010" report. Highlights of this recent collection of crime data include:

- there were **2,095,921** crimes (excluding traffic) reported to Canadian police in 2010; this represents **77,039** fewer crimes reported when compared to 2009.
- the total crime rate dropped **-5%**. This includes a violent crime rate drop of **-3%** and a property crime rate drop of **-6%**.

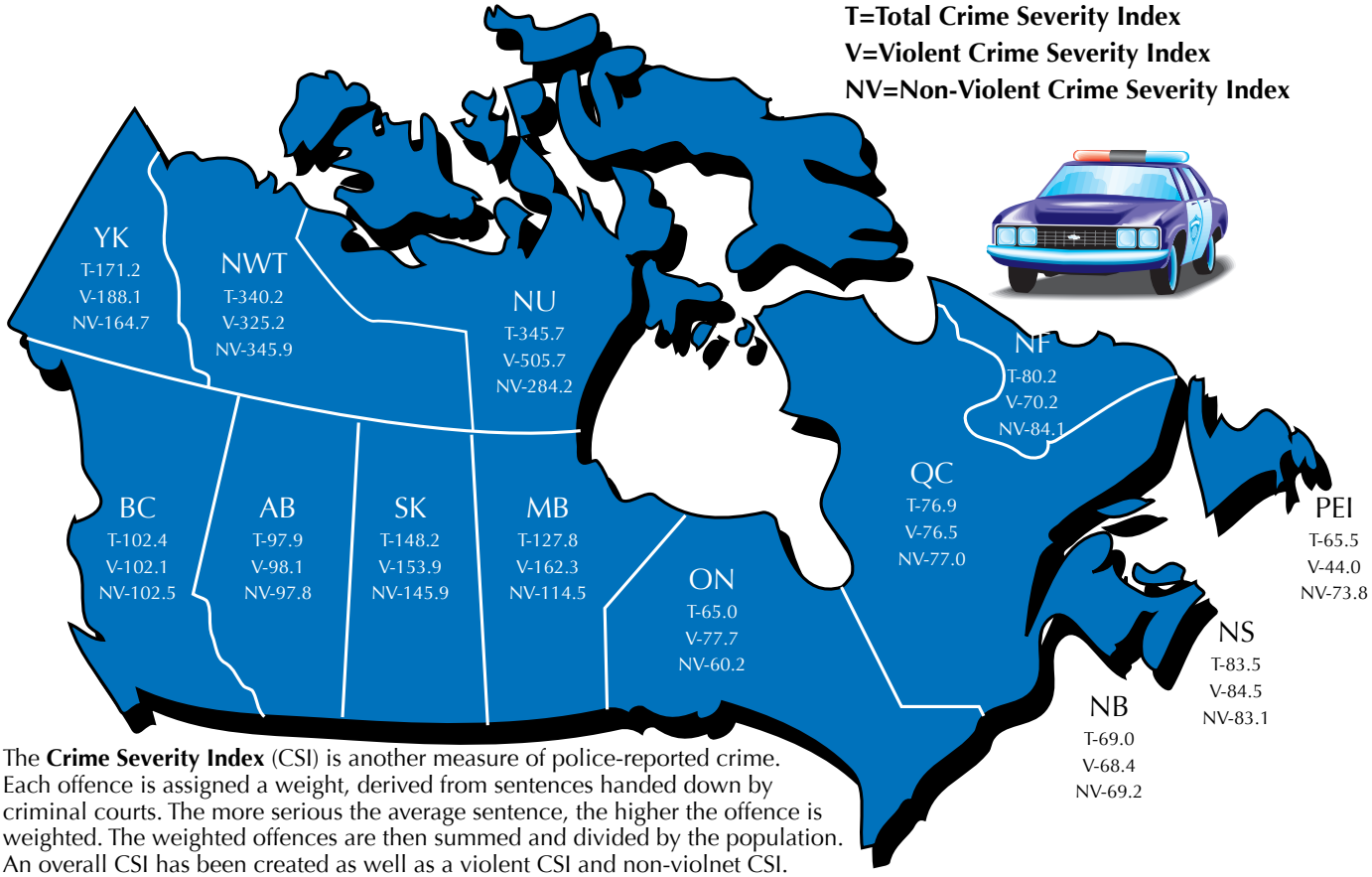
Source: Statistics Canada, 2010, "Police-reported crime statistics in Canada, 2009", Catalogue no. 85-002-X,released on July 21, 2011.

Police-Reported Impaired Driving Offences

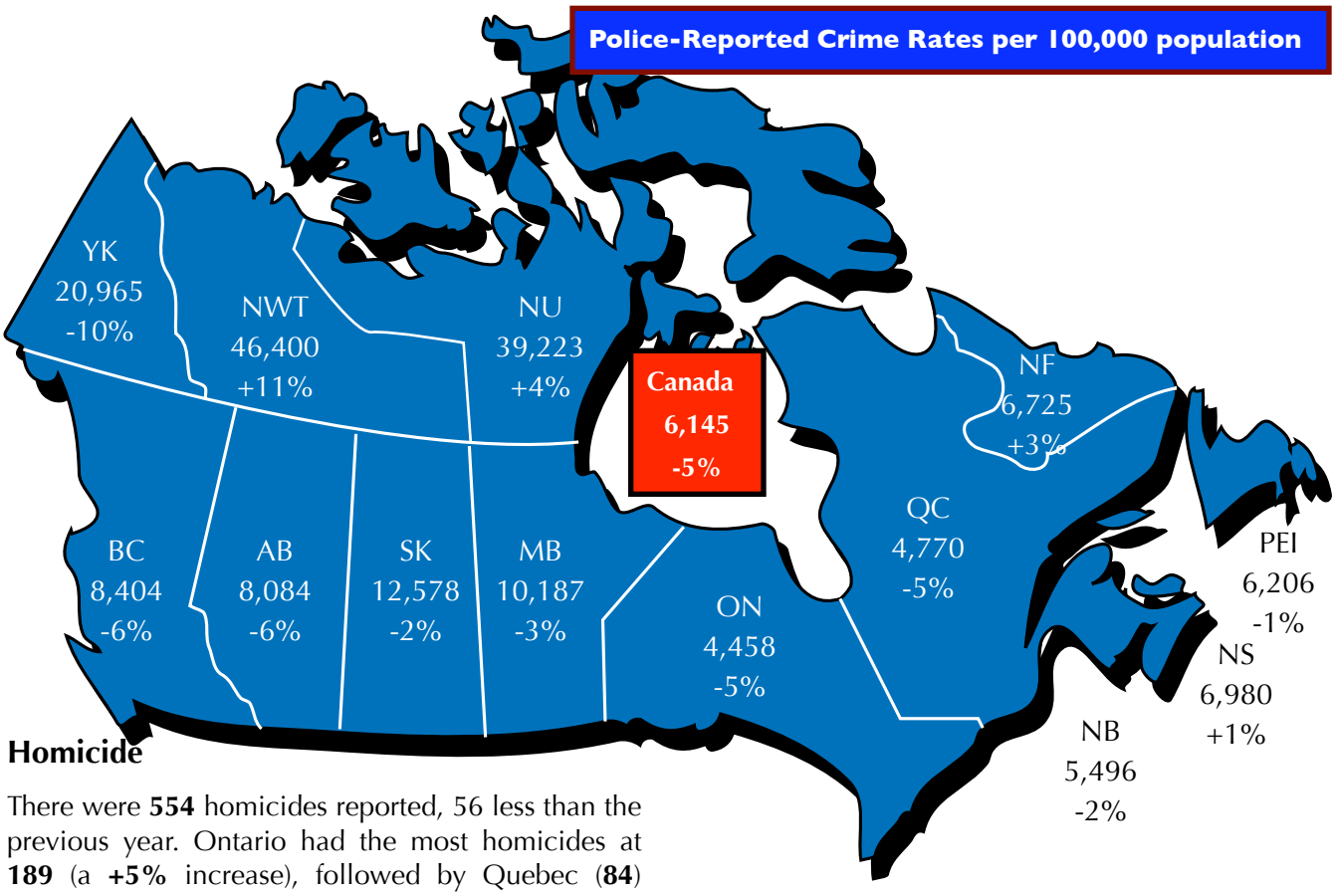
Province	Rate	Impaired Driving Offences	Rate change 2008 to 2009
SK	628	6,566	+3%
AB	399	14,865	-14%
PEI	511	727	+10%
BC	355	16,067	-8%
NF	416	2,119	+22%
NS	363	3,426	+8%
NB	350	2,628	+8%
MB	246	3,040	-18%
QC	208	16,424	-1%
ON	130	17,191	-7%

Police-Reported Crime Severity Indexes

T=Total Crime Severity Index
V=Violent Crime Severity Index
NV=Non-Violent Crime Severity Index



The **Crime Severity Index** (CSI) is another measure of police-reported crime. Each offence is assigned a weight, derived from sentences handed down by criminal courts. The more serious the average sentence, the higher the offence is weighted. The weighted offences are then summed and divided by the population. An overall CSI has been created as well as a violent CSI and non-violnet CSI.



Homicide

There were **554** homicides reported, 56 less than the previous year. Ontario had the most homicides at **189** (a **+5%** increase), followed by Quebec (**84**) British Columbia (**83**), and Alberta (**77**). Prince Edward Island reported no homicides while the Yukon and the Northwest Territories each reported only one homicide. As for provincial or territorial homicide rates, Nunavut had the highest (**18.1** per 100,000 population) followed by Manitoba (**3.6**), Saskatchewan (**3.3**), Yukon (**2.9**), Northwest Territories (**2.3**) and Nova Scotia (**2.2**). As for Census Metropolitan Areas (CMA), Thunder Bay, ON had the highest homicide rate at **4.2**. The Canadian homicide rate was **1.6**.

Top CMA Homicide Rates per 100,000

CMA	Rate	CMA	Rate
Thunder Bay, ON	4.2	Greater Sudbury, ON	2.4
Regina, SK	3.7	Abbotsford-Mission, BC	2.3
Saskatoon, SK	3.7	Moncton, NB	2.2
Winnipeg, MB	2.8	Saint John, NB	1.9
Edmonton, AB	2.7	Kingston, ON	1.9
Halifax, NS	2.7	London, ON	1.8

Canada's Top Ten Reported Crimes

Offence	Number
Theft Under $5,000 (non-motor vehicle)	536,151
Mischief	339,831
Break and Enter	196,881
Administration of Justice Violations	176,560
Assault-level 1	173,843
Disturb the Peace	117,903
Motor Vehicle Theft	92,683
Fraud	88,491
Impaired Driving	84,397
Uttering Threats	75,927

Robbery

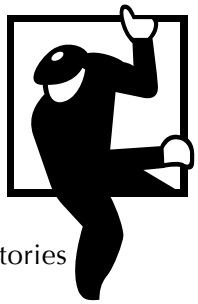
In 2010 there were **30,405** robberies reported, resulting in a national rate of **89** robberies per 100,000 population. Manitoba had the highest robbery rate followed by Saskatchewan, British Columbia, and Ontario.

Police-Reported Robberies			
Province/ Territory	Rate	Robberies	Rate change 2009 to 2010
MB	176	2,177	-11%
SK	121	1,263	0
BC	108	4,878	-7%
ON	88	11,567	-6%
AB	86	3,213	-15%
QC	81	6,442	-6%
NWT	55	24	+84%
NS	52	486	-17%
YK	49	17	+84%
NU	42	14	-41%
NF	31	160	+37%
NB	19	142	-29%
PEI	15	22	+15%
CANADA	**89**	**30,405**	**-7%**

- Winnipeg, MB had the highest CMA rate of robbery in Canada (**258**), **-13%** lower than its 2009 rate. Saguenay, QC had the lowest rate (**19**) for the second year in a row. Three CMAs reported jumps of +20% or more in robbery rates; St. John's, NF (**+53%**), Brantford, ON (**+26%**), and Kitchener-Cambridge-Waterloo, ON (**+20%**).
- five CMAs reported declines in robberies of -30% or more; Saint John, NB (**-50%**), Kingston, ON (**-50%**), Trois-Rivieres, QC (**-31%**), Abbotsford-Mission, BC (**-30%**), and Moncton, NB (**-30%**).

Top Ten CMA Robbery Rates per 100,000			
CMA	Rate	CMA	Rate
Winnipeg, MB	258	Montreal, QC	142
Saskatoon, SK	199	Toronto, ON	128
Regina, SK	196	Edmonton, AB	118
Thunder Bay, ON	149	Calgary, AB	109
Vancouver, BC	147	Halifax, NS	95

Break and Enter



In 2010 there were **196,881** break-ins reported to police. The national break-in rate was **577** break-ins per 100,000 people. Nunavut had the highest break-in rate (**2,035**) followed by the Northwest Territories (**1,629**) and Saskatchewan (**938**).

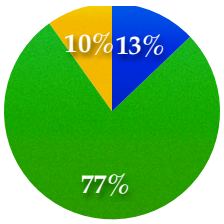
Police-Reported Break-ins			
Province/ Territory	Rate	Break-ins	Rate change 2009 to 2010
NU	2,035	676	+3%
NWT	1,629	713	-2%
SK	938	9,806	-1%
MB	819	10,116	-5%
YK	718	248	-6%
BC	692	31,346	-8%
QC	680	53,733	-9%
NF	667	3,399	+17%
AB	606	22,533	-5%
NS	558	5,259	+3%
PEI	515	732	+1%
NB	483	3,633	+4%
ON	414	54,687	-5%
CANADA	**577**	**196,881**	**-6%**

- break-ins accounted for about **15%** of all property crimes.
- **61%** of break-ins were to a residence, **28%** to a business location, and **11%** to other locations, such as a shed or detached garage.
- residential break-ins dropped **-4%** while business break-ins declined **-13%.**
- from 2000 to 2010, the break-in rate dropped by **-40%.**
- among CMAs, Saskatoon, SK reported the highest break-in rate (**845**) while Toronto reported the lowest (**307**) for a second straight year. Peterborough, ON (**+27%**), Saguenay, QC (**+21%**), and Moncton, NB (**+13%**) all reported double digit increases in the break-in rate, while Abbotsford-Mission, BC (**-37%**), Victoria, BC (**-29%**), Saint John, NB (**-24%**), Sherbrooke, QC (**-19%**), Kingston, ON (**-17%**), Regina, SK (**-16%**), Thunder Bay, ON (**-16%**), Vancouver, BC (**-13%**), Windsor, ON (**-11%**), Guelph, ON (**-10%**), and Ottawa, ON (**-10%**) all had double digit drops.

Top Ten CMA Break-in Rates per 100,000			
CMA	**Rate**	**CMA**	**Rate**
Trois-Rivieres, QC	875	Vancouver, BC	787
Regina, SK	856	Brantford, ON	775
Saskatoon, SK	856	St. John's, NF	766
Winnipeg, MB	810	Abbotsford-Mission, BC	727
Kelowna, BC	796	Gatineau, QC	713

Drugs

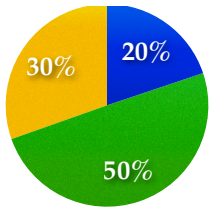
Possession Offences by Drug Type



In 2010 there were **108,529** drug-related offences coming to the attention of police. These offences included possession, trafficking, production or distribution.

- possession offences accounted for **73,588** of these crimes - cannabis (**56,870**); cocaine (**7,256**); and other drugs (**9,462**). Other drugs include heroin, crystal meth, and ecstasy;
- the trafficking, production, and distribution offences totaled **32,974** - cannabis (**16,404**); cocaine (**10,027**); and other drugs (**6,543**).

Trafficking, Production & Distribution Offences by Drug Type



Drug-related Crime Rates by Province per 100,000 population			
Province	**Cannabis rate**	**Cocaine rate**	**Other drugs rate**
BC	421	106	64
SK	252	63	51
NS	251	34	46
QC	208	25	54
NF	205	38	67
NB	199	30	55
AB	195	76	37
ON	165	38	42
MB	157	58	30
PEI	108	22	41

- British Columbia had the highest drug related offence rates of all 10 provinces for cannabis and cocaine. Nova Scotia was tops for other drugs.

Territory	Cannabis rate	Cocaine rate	Other drugs rate
NWT	1,261	293	114
NU	1,039	15	18
YK	327	130	64

- The territories continue to have some of the highest drug-related crime rates in Canada.
- Overall, drug offences were up in 2010 (**+10%**) from 2009, mainly due to a **+13%** rise in cannabis offences.

Motor Vehicle Theft

In 2010 there were **92,683** motor vehicle thefts reported to police, down (**-15%**) from **107,992** in 2009 and down **-48%** from a decade ago.

- on average there were **254** vehicles stolen per day in Canada in 2010.
- the motor vehicle theft rate was **272** per 100,000 population.
- the most vehicles reported stolen was in Quebec (**24,410**) while the Yukon had the fewest vehicles stolen (**160**).

Police-Reported Motor Vehicle Thefts

Province/ Territory	Rate	Motor Vehicle Thefts	Rate change 2009 to 2010
NU	614	204	+2%
NWT	507	222	-5%
MB	453	5,596	-15%
SK	477	4,988	-8%
AB	411	15,298	-18%
BC	352	15,957	-20%
YK	463	160	+18%
QC	309	24,410	-11%
ON	171	22,611	-18%
NB	165	1,239	-4%
NS	136	1,282	-3%
PEI	79	113	-30%
NF	118	603	+30%
CANADA	**272**	**92,683**	**-15%**

- eight CMAs reported declines in motor vehicle thefts of **-25%** or more; Trois Rivieres, QC (**-41%**), Guelph, ON (**-37%**), Brantford, ON (**-31%**), Peterborough, ON (**-31%**), Barrie, ON (**-30%**), Ottawa, ON (**-30%**), Moncton, NB (**-27%**), Victoria, BC (**-27%**), Edmonton, AB (**-26%**), and Kelowna, BC (**-25%**).

Top Ten CMA Vehicle Theft Rates per 100,000

CMA	Rate	CMA	Rate
Regina, SK	562	Saskatoon, SK	471
Abbotsford-Mission, BC	553	Edmonton, AB	446
Winnipeg, MB	503	Vancouver, BC	370
Kelowna, BC	494	Calgary, AB	369
Brantford, ON	474	Montreal, QC	361

CANADA'S TOP 10 STOLEN VEHICLES

1. 2000 Honda Civic SiR 2-door
2. 1999 Honda Civic SiR 2-door
3. 2002 Cadillac Escalade 4-door 4WD
4. 2004 Cadillac Escalade 4-door 4WD
5. 2005 Acura RSX Type S 2-door
6. 1997 Acura Integra 2-door
7. 2000 Audi S4 Quattro 4-door AWD
8. 2003 Hummer H2 4-door AWD
9. 2006 Acura RSX Type S 2-door
10. 2004 Hummer H2 4-door AWD

Source: Insurance Bureau of Canada, December 16, 2010

Police Assaults

Assaulting a police officer rose **+45%** from 2009 to 2010. In 2010 there were **17,377** assault police officer offences compared to **11,837** the previous year. This increase may be attributable to new offences of assault with weapon/CBH to a peace officer and aggravated assault against peace officer which were recently added to the *Criminal Code*.

ABSENCE OF GROUNDS NOT A BASIS FOR SUPERINTENDENT TO REVOKE 24 HOUR PROHIBITION

Rapton v. B.C. (Motor Vehicles), 2011 BCCA 396

The Petitioner, Rapton, was served by a peace officer with a notice of driving prohibition under s. 215(2) of British Columbia's *Motor Vehicle Act* (*MVA*), suspending his right to drive for 24 hours. As a consequence of this prohibition, along with his driving record, his driver's licence was suspended by the Superintendent of Motor Vehicles. He requested a review and revocation of the 24-hour prohibition pursuant to s. 215.1 of the *MVA*, but an adjudicator dismissed the application because neither of the two criteria found in s. 215.3 for revocation had been satisfied:

- if the person subject to the prohibition was not the driver of the vehicle at the time, or
- if the person subject to the prohibition requested, and was refused, the opportunity for a breath test to indicate his blood alcohol level.

The Petitioner's request for judicial review by a British Columbia Supreme Court judge was dismissed. He then appealed that decision to the British Columbia Court of Appeal asking that the 24-hour prohibition be set aside.

The Petitioner submitted that there was no evidence of reasonable and probable grounds for issuing the prohibition because the "Officer's Report" for the prohibition left the "Reasonable and Probable Grounds" portion blank. In the absence of any such evidence, he suggested the prohibition could not stand. The Superintendent of Motor Vehicles, on the other hand, contended that the only grounds upon which the prohibition could be revoked were set out in s. 215.3. Since the petitioner admitted he was the driver and had been given a breath test, the prohibition could not be revoked. The appropriate remedy, suggested the Superintendent, was to seek judicial review of the peace officer's decision to issue the prohibition, rather than the review process initiated under s. 215.1.

BY THE BOOK:

24 Hour Driving Prohibition Revocation: BC's *Motor Vehicle Act*

s. 215.3 If, after considering an application for review under section 215.1, the superintendent is satisfied that

(a) the person on whom the notice of driving prohibition was served had the right to request and requested that the peace officer administer a test to indicate his or her blood alcohol level but the peace officer failed to provide the person with the opportunity to undergo the test, or

(b) the person on whom the notice of driving prohibition was served was not a driver within the meaning of section 215(1),

the superintendent must revoke the driving prohibition.

Justice Prowse, delivering the opinion of the British Columbia Court of Appeal, agreed with the Superintendent. The Superintendent had no power to revoke the prohibition based on an alleged absence of reasonable and probable grounds for its issuance in the first place. "[T]he Superintendent's powers are purely statutory, and, in conducting a review of a Prohibition issued pursuant to s. 215(2) of the Act, are confined to those powers mandated in s. 215.3," said Justice Prowse. "The Court has not been referred to any provision in the Act, or elsewhere, which suggests that, in addition to the statutory powers expressly set out in s. 215.3, the Superintendent has additional discretionary powers to set aside Prohibitions issued under s. 215(2)." She continued:

> The limited powers of review by the Superintendent in this regard appear to be consistent with the nature of s. 215 as a civil or administrative penalty, as opposed to a criminal sanction, designed to promote public safety by removing drivers showing indicia of impairment from the road for a relatively short period of time. Section 215(6) provides an immediate

> internal safeguard against wrongfully issued prohibitions by permitting the driver to request a breath test to demonstrate that his/her blood alcohol level does not exceed 50 mg of alcohol in 100 ml of blood. It does not, however, provide the broad range of protections available to those charged with criminal offences, or the additional administrative protections provided to those who are prohibited from driving for 90 days, for example, under s. 94.1 of the Act (which is not in issue here). While it is true that the ultimate consequence for Mr. Rapton was a lengthy suspension of his licence, that was not the consequence of this Prohibition, per se, but, rather, the consequence of his driving record as a whole. [para. 17]

In this case, the Superintendent had no power to revoke the prohibition because the petitioner did not fall under either ss. 215.3(a) or (b) of the *MVA*. There was no basis for interfering with the decision of the Supreme Court judge upholding the Superintendent's decision. The Petitioner's appeal was dismissed.

Complete case available at www.courts.gov.bc.ca

PSYCHOLOGICAL DETENTION REQUIRES s. 10(b) WARNING: STATEMENTS EXCLUDED

R. v. Way, 2011 NBCA 92

The accused called 911 to report that her common law husband had slipped and fallen on a knife, stabbing himself in the process. At the time there were only four people in the house; the victim, the accused, and their two infant children. An ambulance and the police were dispatched to the home and the victim was transported to the hospital, where he was subsequently pronounced dead. He had died as a result of a stab wound to the heart. Upon learning of her husband's death, the accused collapsed at the hospital. She was given medication to calm her and went to her mother's home, where her children had also been taken. Police officers considered the death to be suspicious. They secured both the residence and the deceased's body in order to pursue their investigation. The accused was asked to attend at the police station, arriving with her mother between 5:30-5:45 p.m. Two officers met them in the public lobby and the accused was taken through a security door to an interview room. Her mother was not allowed to accompany her daughter. Twice the accused's mother asked if they should consult a lawyer and both times they were told "no".

The accused was not advised of the right to call a lawyer nor given any of the usual cautions routinely provided before statements are taken from people suspected of a crime. She was also not informed she had no obligation to provide a statement or that she was free to leave. Instead, an officer told her to stay in the interview room and to advise the officer if she needed or wanted anything. At one point, the accused inquired whether she could leave and was told she could only leave when the interview was over. A videotaped interview started at 5:52 pm. The accused was first asked to write down everything that happened. The interview then continued for more than two hours, with the interviewing officer leaving the room from time to time to consult with another officer. Upon returning from one of these exits at 7:57 pm, the officer determined it was time to comply with s. 10(b) because the police had received information from a confidential source that the accused had killed her husband. The accused was informed that the police were now investigating a murder and she was told she had "the right to retain and instruct legal counsel without delay," be it a lawyer of her choice or a legal aid lawyer. The usual cautions were also given. When asked what she wanted to do about her right to contact a lawyer, she replied "I don't know, my mom's here." When the question was repeated, she answered, "I didn't do anything." The interview resumed and the accused eventually explained she had stabbed her husband in self-defence. The accused was subsequently charged with second degree murder.

At trial in the New Brunswick Court of Queen's Bench the accused brought a motion that her statements were given in breach of her s. 10(b) rights and the evidence was inadmissible under s. 24(2). The Crown, on the other hand, submitted that none of the accused's *Charter* rights were infringed and that, even if they were, the admission of the

statements into evidence would not bring the administration of justice into disrepute. The Crown called police officers to testify. The officers acknowledged that the death was considered suspicious, but that they were only investigating an accident until they were advised of the information given by the confidential informant.

The judge agreed that the accused's s. 10(b) rights had been breached. Although the accused attended the police station of her own accord, the judge found she felt obliged to do so. She was then taken through a secure door into a controlled area of the station and to a closed-door interview room. Her mother was not allowed to accompany her and was twice told there was no need for her to call a lawyer. While in the interview room she was instructed that if she needed or wanted something when the officer was not present, she was to knock on the door and wait for the officer to respond. She was questioned repeatedly for over two hours and was never advised she was free to leave. The judge found that psychological detention had occurred; a reasonable person in the accused's circumstances would have concluded by reason of the police conduct that she had no choice but to comply. He found the *Charter* breach was not "an inadvertent or minor violation" and very close to "the level of willful or flagrant" conduct. He also recognized that both the right to counsel and the right against self-incrimination are important rights that are fundamental to the administration of justice. Finally, in considering the reliability of the evidence, the seriousness of the offence, and the importance of the evidence to the prosecution's case, he concluded the evidence should be excluded under s. 24(2). The accused was acquitted.

The Crown appealed the acquittal, arguing the trial judge erred in finding a violation of the accused's *Charter* rights. In the Crown's view, the trial judge misapplied the test for determining whether there was a psychological detention that triggered s. 10(b). Since the officer asking the accused to attend for the interview did not have reasonable grounds for believing she was responsible for stabbing the victim, their intent was simply to get a statement regarding the accident. The officer did not intend nor consider her detained. For example, the officer left the room on several occasions. At one point the officer called a social worker to assist the accused in informing her children of the death of their father and the accused was allowed to use the washroom in the presence of her mother. The accused suggested the Crown was placing too much emphasis on the subjective view of the police and not on the view of the reasonable person in her position. Regardless of subjective belief, the test is an objective one; whether a reasonable person in her position would have felt obliged to follow the police's directive.

Detention & s. 10(b) Charter

Justice Richard, authoring the unanimous New Brunswick Court of Appeal opinion, recognized that if the accused was detained before she was advised of her rights then she should have been told of them without delay upon commencement of the detention. If she was not detained prior to her rights being given, then there would be no s. 10(b) breach. The issue in this case was whether the accused had been psychologically detained. Justice Richard stated:

> Psychological restraint can arise when there is a legal requirement for the subject to comply with a direction or demand, for example in the case of a demand to provide a breath sample in a roadside screening device. However, it can also occur, in the absence of a legal requirement to comply, in situations where a reasonable person in the subject's position would feel obligated to comply with a police officer's direction or demand. The rationale for including this type of restraint as part of the definition of "detention" in ss. 9 and 10 of the Charter is that "[m]ost citizens are not aware of the precise legal limits of police authority" and "[r]ather than risk the application of physical force or prosecution for willful obstruction, the reasonable person is likely to err on the side of caution, assume lawful

"[Psychological restraint] can also occur ... in situations where a reasonable person in the subject's position would feel obligated to comply with a police officer's direction or demand."

> authority and comply with the demand". The inquiry to determine whether there has been psychological restraint without a legal requirement to comply is an objective one. "The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand". Thus, in the present case, the relevant question is whether a reasonable person in [the accused's] situation would have felt she had an obligation to comply with the officers' demand for a statement. The inquiry "involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements" … "[I]n those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go". [references omitted, paras. 28-29]

In determining whether a reasonable person in all of the circumstances would conclude they had been deprived of the liberty of choice, a court is required to consider the following factors:

- The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: **circumstances**
  - ➡ whether the police were
    - providing general assistance;
    - maintaining general order;
    - making general inquiries regarding a particular occurrence; or
    - singling out the individual for focussed investigation.
- The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter. **conduct**
- The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication. **characteristics**

In this case, the Court of Appeal found that the trial judge properly applied these factors. There was psychological restraint at the outset of the interview sufficient to trigger s. 10(b). While the accused was an adult, she was young, not assertive or confident, and unsophisticated. "Thus, the question is whether a reasonable young, non-assertive, not confident and unsophisticated person would have felt obliged to cooperate with the investigation in the circumstances," said Justice Richard:

> The accident reported to the 911 service involved a stabbing that eventually led to the death of a man. Any reasonable person would expect that, in those circumstances, the police would want to investigate the "accident". This is not a case where the police are providing general assistance, maintaining general order or making general inquiries regarding a particular occurrence. It is a case where the investigators considered [the victim's] death to be "suspicious". Any other characterization would have been absurd. One does not generally expect an individual to fall on a knife, stabbing himself through the heart. The police were aware only two adults had been in the home when [the victim] was stabbed and they necessarily had to single out [the accused] for focused investigation. While it may be that initial inquiries made at the scene or even at the hospital might be characterized differently, the fact is that what occurred at the police station was a focused investigation involving [the accused]. If she had simply been asked to provide a statement as to what happened and no more, the situation might then also be characterized differently. However, she was repeatedly questioned for two hours; evidence that, in the circumstances, she was the

"The inquiry to determine whether there has been psychological restraint without a legal requirement to comply is an objective one. 'The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand'."

subject of a focused investigation.

I agree with the trial judge that a reasonable person in [the accused's] situation would not have felt detained when the officers attended at her mother's home and asked her to attend at the police station. However, the outlook of the reasonable person would take a dramatic change when, having arrived at the police station, the person is taken to a controlled part of the police station to a closed-door interview room and told that if anything was needed or wanted to knock on the door. At that point, a reasonable person's perception of any freedom to leave would be significantly diminished. When one adds to that being an unsophisticated young person who was advised her mother can't attend for the interview and was effectively told she cannot leave until the interview is over, the reasonable person would obviously perceive the enjoyment of his or her liberty as drastically curtailed.

… In some instances, there will be little doubt that a reasonable person would expect to be questioned and would know he or she is not being detained so as to trigger s. 10(b) of the Charter. However, in other circumstances the line may be difficult to discern between situations where a reasonable person would feel free to walk away and those where an individual would reasonably feel compelled to incriminate himself or herself. In those instances, the majority of the Supreme Court has given police investigators a tool to ensure the line remains clear. Where there is uncertainty, the police may choose to "inform the person that he or she is under no obligation to answer questions and is free to go" or otherwise they risk the possibility that "a detention may well crystallize" requiring the need to advise the person of his or her s. 10(b) rights.

I pause to add that there may be situations where the police advise a person that he or she is under no obligation to answer questions and is free to go, which would still result in a finding of psychological restraint. However, detention will certainly be much more difficult to establish when such information has been genuinely provided. [references omitted, paras. 37-40]

"[T]he line may be difficult to discern between situations where a reasonable person would feel free to walk away and those where an individual would reasonably feel compelled to incriminate himself or herself."

Here, the accused was not advised she was under no obligation to answer questions and that she was free to go. "In fact, the situation suggested she was not free to go," said Justice Richard. "She was taken without her mother to a secured area of the police station to a closed-door interview room, told to knock on the door if she needed or wanted anything, repeatedly questioned for two hours and told she would be allowed to leave when the interview was over." The failure of the police to make it clear to the accused that she had no obligation to answer their questions and was free to go crystallized a detention before she was interviewed and she should have been advised of her right to counsel. Since she was not provided with her right to counsel upon detention a s. 10(b) violation occurred.

s. 24(2) *Charter* Analysis

The s. 24(2) *Charter* framework requires a court to balance the effect of admitting the evidence on society's confidence in the justice system having regard to:

- the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
- the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little) and;
- society's interest in the adjudication of the case on its merits".

Balancing the results of these three lines of inquiry, the Court of Appeal ruled that all factors favoured exclusion. In this case the *Charter* breach was not a minor nor inadvertent slip, but more on the serious side:

> … The officers knew or ought to have known they were focusing their investigation of Mr. Richard's suspicious death on [the accused'" said Justice Richard. "They knew or ought to have known she was a young, non-assertive and unsophisticated individual. Yet, knowing the possible legal consequences for [the accused], the officers refused to allow her mother to be present with her, twice asserted she did not need a lawyer, questioned her for two hours under the guise they simply wished to determine how the accident occurred and told her she could only leave once the interview was finished. Note that I am not saying the officers had any obligation to allow [the accused's] mother to be present for the interview, just that they did not do so.
>
> As stated earlier, a reasonable person in [the accused's] situation would have felt detained and would certainly not have believed having the freedom to refuse to answer and leave. If a reasonable person would have perceived the situation like this, it seems inconceivable that two experienced police officers would not have come to the same conclusion. However, since the trial judge stopped short of finding a flagrant violation, I will do the same and, as he did, place this violation on the serious side of the spectrum without going to the extreme end. [paras. 49-50]

The Charter-protected interests in this case involved not only the right to counsel, but also the right to silence, and there were no circumstances that might have attenuated the impact of the s. 10(b) violation. "This was not a case of a spontaneous utterance or a situation where the individual was specifically informed it was his or her choice to speak to the police," said Justice Richard. Plus, sometimes there is reason to doubt the reliability of statements taken in contravention of the *Charter*. Even the Crown did not consider these as a reliable source of the truth. In the first statement, the accused maintained it was an accident. In the second statement, she asserted self-defence, yet she was charged with second degree murder. The exclusion of the statements was necessary so as not to bring the administration of justice into disrepute.

The Crown's appeal was dismissed.

Complete case available at www.canlii.org

COMPUTER WARRANT DOES NOT CARRY UNTRAMMELED RIGHT TO RUMMAGE

R. v. Jones, 2011 ONCA 632

The police investigated the accused for a fraud related to the purchase of a motorcycle listed for sale on e-Bay. They believed he had participated in a fraudulent Internet scheme involving the sale of the motorcycle and that the invoice for the transaction was a computer generated forgery. Police obtained a warrant authorizing the search and seizure in his residence of data relating to certain e-mail transactions, images relating to counterfeit items, and any electronic data processing and storage devices, personal computers and computer systems. The terms of the search warrant, which contained no restrictions on the types of computer files that could be searched, were broad and authorized the police to seize a number of things, including any computers and related equipment. Before starting his inspection of the computer's two large hard drives, the police analyst concluded that it was necessary to search all document and image files for evidence of the fraud. Since the warrant contained no date limitation, the analyst did not limit his search to any particular date range. During his initial review of the document and image files, the analyst found images that he believed constituted child pornography. Crown counsel was contacted to determine whether a warrant should be obtained to search for further child pornography. The advice received from a seasoned Crown Attorney was that a full examination of the hard drives would be allowed, even looking at video files that the analyst would not have examined if the search had been confined to looking for evidence related to only the fraud investigation. As a result, the full examination of the hard drives yielded 57 images and 31 videos of child pornography. The accused was charged with possession of child pornography.

At trial in the Ontario Superior Court of Justice the judge concluded that the accused's s. 8 *Charter* rights protecting him against unreasonable search and seizure were breached because the warrant did

not authorize a review of the computer hard drive for anything other than evidence of fraud. The judge found the Crown advice given to the police was "reckless and cavalier" and symbolic of an institutional failure. The child pornography found as a result of the search was excluded and the charges were dismissed. An acquittal was entered.

The Crown challenged the trial judge's ruling to the Ontario Court of Appeal, arguing the trial judge erred in finding a s. 8 *Charter* breach. First, in the Crown's view, the search warrant itself properly authorized the seizure of child pornography evidence because the warrant placed no limitations on the police and they were therefore entitled to make a full examination of the entire computer contents including a search for child pornography. Second, the manner of the search was reasonable; the officer's conduct showed appropriate regard for the accused's *Charter* rights. Finally, the "plain view doctrine" and s. 489 of the *Criminal Code* applied in the computer context and supported a legal search for and seizure of child pornography.

Justice Blair framed the question on appeal as, "What happens when the police are lawfully searching a computer pursuant to a valid warrant for one crime and they discover evidence of another – are they permitted to continue the computer search for further evidence of the second crime without another warrant?" To answer this question, the Court of Appeal had to determine "whether the search for evidence of child pornography was authorized by the terms of the warrant itself or, if not, whether it was otherwise authorized in law and conducted in a reasonable manner." Before addressing the essential issue, Justice Blair briefly recited the principles underlying s. 8 of the *Charter*:

> A search and seizure is only lawful if it is authorized by law and if both the law and the manner in which the search is carried out are reasonable. The onus is on the person seeking to establish the breach to show that his or her s. 8 rights have been violated. A warrantless search is prima facie unreasonable, however, and therefore a breach of s. 8, and the onus is on the Crown in such circumstances to prove that such a search was reasonable.
>
> To give effect to the s. 8 right involves an assessment in each case of whether the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals – in particular, those related to law enforcement. The Charter's bias is in favour of the former and, accordingly, in order to prevent unjustified searches, a legally valid pre-authorization, such as a warrant, is a pre-condition to a lawful search and seizure, where it is feasible to obtain one.
>
> [T]he primary value underpinning the s. 8 right is the need to protect an individual's reasonable expectation of privacy in the target of the proposed search against unreasonable intrusion by the State. The privacy expectation encompasses not only property interests but personal and informational privacy too. [references omitted, paras. 19-21]

In this case, the Court was concerned with the accused's reasonable expectation of informational privacy.

THE CROWN ADVICE

The Crown Attorney providing the legal advice in this case was very experienced in matters relating to search and seizure. He had practiced for 21 years and for 11 years was a co-director of the Search and Seizure course at the Ministry of the Attorney General's summer "Crown School" attended by prosecutors from across the country. He was a designated wiretap agent and had lectured widely to lawyers and police on a variety of search and seizure issues. He was also providing legal advice to police several times a week, most frequently with respect to search and seizure issues.

The Warrant Itself

Justice Blair found that the trial judge was correct in holding that the warrant itself was valid for purposes of authorizing the search for evidence of fraud, but that it did not authorize a search for evidence of child pornography other than that found in the data image files. "Although [the warrant] contained no limitations on the types of files that could be examined, it was reasonably focused and limited in the types of evidence the police could seek; and that evidence did not include evidence of child pornography," he said. And further:

> I do not accept that the right to examine the entire contents of a computer for evidence of one crime (fraud, in this case) carries with it the untrammelled right to rummage through the entire computer contents in search of evidence of another crime (possession of child pornography, in this case) without restraint – even where, as here, the warrant may properly authorize unlimited access to the computer's files and folders in order to accomplish its search objectives. A computer search pursuant to a warrant must be related to the legitimate targets respecting which the police have established reasonable and probable grounds, as articulated in the warrant.
>
> Here, that focus has been accomplished not by limiting access to the contents of the computer but – as described above – by framing the type of evidence that may be sought (evidence relating to the email transmissions and to counterfeit images) and the crimes to which that evidence relates (possession of stolen property and forgery). The focus on the type of evidence being sought, as opposed to the type of files that may be examined is helpful, it seems to me, particularly in cases where it may be necessary for the police to do a wide-ranging inspection of the contents of the computer in order to ensure that evidence has not been concealed or its resting place in the bowels of the computer cleverly camouflaged.
>
> To the extent they are required to examine any file or folder on the computer to reasonably accomplish that authorized search, the police are entitled to open those files and folders and to examine them, at least in a cursory fashion, in order to determine whether they are likely to contain evidence of the type they are seeking. [paras. 42-44]

"A computer search pursuant to a warrant must be related to the legitimate targets respecting which the police have established reasonable and probable grounds, as articulated in the warrant."

Here, the police could have obtained a second warrant to search for evidence of child pornography. The computer search was being performed off-site and post-seizure. There was no urgency and nothing prevented the police from applying for another warrant.

The Court of Appeal also rejected the Crown's argument that the warrant authorized the search

One Seizure Fits All?

Example's used, but rejected, to support the Crown's one seizure fits all analogy included:

- a suspect's clothing seized under a warrant in a sexual assault investigation may later be tested for semen in the context of a subsequent murder investigation.
- body samples (scalp and pubic hair) given on consent with a view to eliminating an individual as a suspect in one murder case were properly tested for a DNA match in connection with a second murder.

The rationale for the one seizure fits all analogy is that no reasonable expectation of privacy remains in an object once it has been lawfully obtained by the police for the purpose of criminally investigating the suspect. However, the analogy between forensic testing of a physical object and the examination of the contents of a computer, was rejected by the Court of Appeal. With a physical object, information is generated by the physical characteristics of or adhering to the object targeted. In the case of a computer, it is the informational contents of the computer itself that is the target of the search.

because a computer is an indivisible object which, like pieces of physical evidence, can be tested and inspected in whatever ways the police deem necessary once lawfully seized under the warrant. In other words, just because the warrant contained no limiting terms with respect to the parts of the computer that could be searched, a full examination of all the data stored on the computer (as if it is one indivisible item) was not properly authorized. Rather, the police were not entitled to roam around through the contents of the computer in an indiscriminate fashion without further authorization. The police have access to software, technology and expertise enabling them to focus on the files they think will generate the evidence they are looking for.

"Plain View" and s. 489 *Criminal Code*

There are times when "the discovery of evidence pointing to a second (and unanticipated) crime can piggy-back onto the lawful execution of a computer-search warrant directed at a different crime" through the plain view doctrine or s. 489 of the *Criminal Code*. Both the common law plain view doctrine and s. 489 are exceptions to the general rule that a warrantless search is unreasonable and, therefore, violative of s. 8. This can occur when a lawfully conducted search of data and image files for evidence of one crime (such as fraud) results in the discovery of image files of another crime (such as child pornography). Justice Blair described the plain view doctrine as follows:

> The "plain view" doctrine operates when a police or peace officer is in the process of executing a warrant or an otherwise lawfully authorized search with respect to one crime and evidence of another crime falls into plain view. Resort to this common law power is subject to the following restraints, however:
>
> (i) The officer must be lawfully in the place where the search is being conducted ("lawfully positioned", in the language of the authorities);
>
> (ii) The nature of the evidence must be immediately apparent as constituting a criminal offence;
>
> (iii) The evidence must have been discovered inadvertently;
>
> (iv) The plain view doctrine confers a seizure power not a search power; it is limited to those items that are visible and does not permit an exploratory search to find other evidence of other crimes. [references omitted, para. 56]

In this case, plain view and/or s. 489 could only justify the seizure of the images of child

BY THE BOOK:

Criminal Code: s. 489

s. 489 (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

pornography discovered during the first review of the computer files for fraud-related evidence. "[The analyst] was lawfully examining the image files under the warrant when he unexpectedly saw images that were immediately recognizable as images of child pornography," said Justice Blair. "Thus, his detection of the child pornography images in those files met all the requirements of both the plain view doctrine and s. 489 of the Criminal Code." The child pornography found in the image files discovered in the course of the initial search for fraud-related evidence in this case did not violate s. 8 and the police were entitled to seize them. However, the video files of child pornography found in the subsequent search after the Crown advice had been obtained were not lawfully seized. The Court of Appeal explained:

> First, the video files were not sitting "in plain view" following the discovery of the child pornography image files and, while the plain view doctrine authorized [the analyst] to seize those image files, … it did not authorize him to conduct a further exploratory search for other evidence of child pornography. Secondly, the videos were not inadvertently or unexpectedly discovered during the subsequent search he did conduct. [The analyst] suspected he might find more evidence of child pornography if he did the further search, and he was deliberately looking for that evidence. The doctrine therefore did not apply. Finally, to permit the plain view doctrine to operate in such circumstances would be to run the risk of overseizure, a risk to which electronic media searches are particularly susceptible and something the court must guard against. [reference omitted, para. 67]

Nor did s. 489 apply. Its reach also stopped with the discovery of the image files. "Implicit in the s. 489 power is the premise that the law enforcement officer has come across or seen something in the course of a lawful search," said the Court. "The law enforcement officer must have reasonable and probable grounds to believe that that something "will afford evidence" of a crime. [But here], the computer analyst did not come across or see the video files in the course of his initial seizure and search of the computer. Like the plain view doctrine, s. 489 provides law enforcement agencies with a right to seize. It does not provide them with a right to search for further evidence."

"Like the plain view doctrine, s. 489 provides law enforcement agencies with a right to seize. It does not provide them with a right to search for further evidence."

s. 24(2) *Charter*

Since the seizure of the image files containing child pornography found during the initial search did not constitute a s. 8 breach, those files were admissible and s. 24(2) did not arise in respect of them. However, s. 24(2) did apply to the video files containing child pornography found during the subsequent search. Justice Blair concluded that the trial judge's characterization of the Crown's advice for the police to continue without a further warrant as "cavalier or reckless" was unnecessary and unfounded. Although the Crown's advice turned out to be wrong, it did not follow that this ought to have been "obvious" from the beginning and that the Crown's advice was negligent, reckless or in wilful disregard of the accused's *Charter* rights. In the end, the Ontario Court of Appeal was satisfied in all the circumstances that the administration of justice would be brought into greater disrepute, in the long-term, if the video file evidence was excluded rather than included:

> The police acted in good faith throughout, believing they had the lawful right to continue their search of the computer. While the Crown's advice turned out to be incorrect in the end, the Crown did not fail to act in good faith. Crimes involving child pornography are among the most abhorrent in society. Society's interest in having these charges tried on their merits, with the important, reliable and real evidence that is available being tendered, is very high. [para. 102]

Balancing all of the s. 24(2) factors, the evidence was admissible. The Crown's appeal was allowed, the accused's acquittal was set aside, and a new trial was ordered.

Complete case available at www.ontariocourts.on.ca

TECHNICIAN'S OBSERVATIONS ADMISSIBLE: DID NOT ARISE FROM A CHARTER BREACH

R. v. Luthmedial, 2011 ONCA 585

After observing the accused swerving from one lane to another and drive up on the sidewalk and almost hit another car, a citizen called 911 to alert the police. The responding police officer saw the accused's vehicle swerving between lanes while traveling about 40 km/h. The van's pace of travel was erratic; it would slow down and speed up. A second officer also observed the vehicle swerving between lanes and speeding up and slowing down. When the van stopped, the officers approached it and found its door open. The accused was in a semi-conscious state, looking "extremely sleepy"; he was not talking or responding to comments made by the officers. An officer believed that the accused was intoxicated and on the verge of passing out. He was removed from the van and arrested for impaired driving on the basis of information provided by the citizen, his manner of driving, and his mannerisms as observed by the police once he had been stopped. The accused was taken to the police station and presented to a qualified technician for the purpose of taking breath samples. The technician made certain observations, such as a smell of alcohol on the accused's breath, bloodshot and glassy eyes, slight unsteadiness when walking, and a very slight slurring of speech. He asked the accused several questions and obtained answers in response. Two breath samples were taken resulting in readings of 94 mg% and 85 mg%.

At trial in the Ontario Court of Justice the accused sought the exclusion of evidence on the basis of *Charter* breaches. Since the breathalyzer tests were warrantless searches, they were unreasonable unless the Crown could provide proper justification. The trial judge found that the police did not have reasonable and probable grounds to believe that the accused had, as a result of the consumption of alcohol, committed the offence of impaired driving under s. 253 of the *Criminal Code* and therefore the police did not have the authority to arrest the accused under s. 495 nor demand a breath sample under s. 254(3). As for the s. 9 issue, the trial judge found the accused's detention not arbitrary. Although the arrest was inappropriate on the impaired driving charge, there were other grounds upon which to detain the accused and investigate further. However, the breathalyzer test constituted an unreasonable search and the test results were excluded as evidence. The answers to the technician's questions were also excluded as they arose from, were part of, or were "derivative" of the breathalyzer testing. The technician's observations, however, were ruled admissible. The observations did not arise from the unreasonable searches nor were they derivative of the breathalyzer tests. The accused was found guilty of impaired driving on the basis of the observations made by the arresting officers and the breathalyzer technician.

An appeal by the accused to the Ontario Superior Court of Justice, arguing that the observations of the breathalyzer technician should be excluded, was dismissed. In the accused's view, the observations were conscripted evidence which should have been excluded as well. The appeal judge, however, disagreed. It was open to the trial judge to find that the technician's observations did not arise from a *Charter* breach. The accused's detention was not arbitrary and the officers were allowed to continue their investigation. Because the police may have decided, following further investigation, to charge the accused with dangerous driving it was open to the trial judge to find that the observations arose outside of the test. "The breathalyzer technician was a police officer involved in the continuing investigation which arose from the detention that was not arbitrary," said the appeal judge. "The observations he made did not arise from the test and were independent of it. If another officer had been involved in the investigation, the same or similar observations would have been made."

The accused then challenged the appeal judge's ruling to the Ontario Court of Appeal. He again submitted that he was arbitrarily detained under s. 9 of the *Charter* and, as a result, the observations of the breathalyzer technician as to his impairment should be excluded.

In support of his argument the accused agreed that the initial stop by police was lawful due to his "bad driving", but that the police did not observe the usual signs of impairment at the scene, such as glassy eyes, alcohol breath odour, or slurred speech. Therefore, there were no grounds to make a demand for a sample of his breath. In his opinion, his continued detention was an arbitrary one that contravened s. 9 of the *Charter* even if he would have been arrested in any event for dangerous driving. The *Criminal Code* has a scheme to deal with alcohol-related offences and the officers did not comply with it. Since his continued detention was arbitrary, the technician's observations ought to have been excluded under s. 24(2) of the *Charter*, just as the results of the breathalyzer tests were excluded.

But the Ontario Court of Appeal disagreed:

> The [accused's] initial detention was lawful pursuant to s. 216(1) of the Highway Traffic Act. The lack of reasonable grounds to arrest the [accused] for impaired driving did not convert his detention into an arbitrary detention. The [accused's] continued detention was justified to further the investigation into his horrendous driving. The observations of the breathalyzer technician were admissible as evidence of impairment because they did not arise as a result of a Charter violation. The observations made by the breathalyzer technician could have been made by any police officer at the station. The [accused] was not arbitrarily detained. [para. 4]

As the Court of Appeal noted, there was "a strong line of authority [that] supports the proposition that a police officer's observations of a lawfully detained suspect are not conscriptive evidence because they were not obtained through the suspect's participation." The accused's appeal was dismissed.

Complete case available at www.ontariocourts.on.ca

Editor's note: Underlying facts and judgment of the Ontario Superior Court of Justice was obtained from *R. v. Luthmedia*l, 2009 CanLII 30966.

CN POLICE OFFICERS FALL WITH s. 2 CRIMINAL CODE DEFINITION

R. v. Lord, 2011 BCCA 295

A member of the Canadian National Railway Police Force (CNP) was patrolling at a CN railway crossing when he saw an individual driving a van fail to stop at the crossing. He pulled it over to issue a ticket to the vehicle's driver. The accused, who was monitoring the crossing, was of the view that the CNP did not have the jurisdiction to issue traffic tickets to motorists in British Columbia who were using provincial roadways. He approached the driver's vehicle when the officer was writing up a ticket and told him that the CNP did not have the authority or jurisdiction to issue a ticket. The officer asked the accused to stand back and allow him to carry out his duties, but he refused to do so. Instead he swore at the officer and pushed him. When the officer tried to arrest the accused for obstructing and assaulting a peace officer, a struggle ensued. After back-up arrived, the accused was arrested and handcuffed. He was convicted with assaulting a peace officer, resisting a peace officer, and assault with intent to resist lawful arrest, and sentenced to 30 days' imprisonment followed by two years of probation.

The accused appealed his convictions to the British Columbia Supreme Court on several grounds. First, he argued that the underlying policy, which permits the appointment of railway police, was long overdue for a change. In his view, it was not appropriate to have legislation that enabled a private corporation to have its own security guards appointed as police constables to enforce federal or provincial laws. Second, he submitted that the definition of a peace officer in the *Criminal Code* was too vague to enforce. Further, the constable in this case was appointed under the *Canada Transportation Act* (*CTA*) by a justice of the Superior Court of Alberta and could not enforce laws in British Columbia. Finally, he argued that s. 44(3) of the *Railway Safety Act* was *ultra vires* the federal government as an encroachment on provincial

powers over policing, pursuant to s. 92(14) of the *Constitution Act, 1867*. All of these arguments, however, were rejected.

The accused then sought leave before the British Columbia Court of Appeal to appeal the Supreme Court judgment. Included in his grounds for appeal was that the appeal judge erring in law in finding that CN police constables were "peace officers" as defined in s. 2 of the *Criminal Code* and that the definition of peace officer was not void of vagueness as being overly broad. In order for leave to be granted, the applicant, in this case the accused, needed to establish that the appeal involved a question of law, the issue was one of importance, and there was sufficient merit in the proposed appeal that it has a reasonable possibility of success.

Application of s.2 "peace officer" definition

Justice Hinkson, in chambers, concluded this ground of appeal was one of law and one of importance, but there was no reasonable possibility it would succeed on appeal. The appeal judge had properly addressed the status of the CN constables. They were duly appointed as constables under the provisions of the *CTA* and it did not matter that the *CTA* was not specifically mentioned in the *Criminal Code* definition of peace officer. What mattered was that the constables were appointed as police constables and were "employed for the preservation and maintenance of the public peace". Thus, CN constables fell within the definition of "peace officer" in s. 2 of the *Criminal Code*. Plus, the argument that private railway corporations should not be permitted to employ "police officers" for a variety of policy reasons was better left for Parliament, not the courts. Finally, the fact that one of the CN constables was appointed by an Alberta superior court judge did not result in a lack of jurisdiction to act as a peace officer in British Columbia. Once the constable was validly appointed according to the statutory provisions, they had jurisdiction to act as such anywhere the railway owned, possessed, or administered property. Although appointed in Alberta, the officer may enforce the laws of Canada or any province insofar as their enforcement relates to the protection of property owned, possessed, or administered by CN or the protection of persons or property on or within 500 metres of CN property.

The scope of the s. 2 peace officer definition

This issue was also one of law and arguably one of importance. The appeal judge found there was no question that the definition of "peace officer" was very broad. However, that did not necessarily make it "vague or unenforceable." In this case, the appeal judge found there was no doubt that the CN officers were police constables at the time of the incident. They were duly appointed as such under the *CTA* and it did not matter that the *CTA* was not specifically mentioned in the *Criminal Code* definition. It was proved at trial that the two CN officers were appointed as police constables and were "employed for the preservation and maintenance of the public peace". As a result, they fell within the definition of "peace officer" in s. 2 of the *Criminal Code*.

In his submission to the Court of Appeal, the accused emphasized that the appointment of police constables pursuant to s. 44 of the *Railway Safety Act* at the initiation of a multinational corporation created police constables who were immune from Charter scrutiny. But Justice Hinkson found this submission was without merit. "Section 44 of the *Railway Safety Act* requires a judge of a Provincial superior court to make the appointment, providing assurance that only suitable candidates will be appointed," he said. "Once appointed, these constables exercise their authority pursuant to the statute under which they are appointed, and as such, are then subject to the same Charter scrutiny as any others who fall within the definition of peace officers found in s. 2 of the Code." There was no possibility of success on this ground of appeal and leave was therefore not granted.

The other grounds of appeal were also dismissed and the accused's application for leave to appeal was refused.

Complete case available at www.courts.gov.bc.ca

LOSS OF EVIDENCE CONFINED TO CASES WHERE POLICE HAVE GROUNDS FOR WARRANT

R. v. Kelsy, 2011 ONCA 605

The accused and her two-year-old daughter spent the night at the sixth-floor apartment of the child's father, a drug dealer. She was to start a new job the following day and the apartment was near her daughter's new daycare. At about 7:00 am the following morning, the father left his apartment and was immediately set upon by two armed men who pistol-whipped him and wrapped him with duct tape. The accused heard the struggle, went out on the apartment balcony, and asked the next-door neighbour to telephone the police. In response to the 911 call, uniformed police officers, including members of the Emergency Task Force (ETF), arrived on the scene and made their way to the sixth floor. As police began their preparations to clear the apartment, an ETF officer knocked on the door to the apartment and the accused came out with her daughter. She was carrying a knapsack and two shopping bags. On direction of the police she dropped the bags. She said there was no one else in the apartment and asked if she could just get her knapsack, saying it had her daughter's belongings and she had to take her daughter to daycare. The officer told her that she would get the knapsack as soon as ETF cleared the apartment because there were two males who had guns.

> "While the burden of proof of a Charter violation is ordinarily on the accused, once the accused has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable within the meaning of s. 8."

The accused and her daughter were escorted downstairs by another police officer, but she was not searched at that time. ETF went into the apartment and confirmed that no one was present. Once the accused and her daughter were gone, the officer unzipped the knapsack and looked through it. He found a loaded handgun and a magazine wrapped in a shirt. As well, he found a scale, a pocket telephone book, and a plastic bag containing heroin. The knapsack also contained some papers belonging to the accused, a purse and a passport in the name of another man. The clear shopping bags contained children's things. The police later obtained a search warrant for the apartment but no further drugs were found.

At trial in the Ontario Superior Court of Justice the accused testified that on the previous evening, while she was alone with her daughter, she discovered a handgun in a dresser drawer. When she heard someone trying to get into the apartment she wrapped the handgun in a sweater and concealed it in the backpack to protect herself and her daughter. She was "happy and relieved" to see the police when she got outside of the apartment and she planned on giving the gun to them. Concerning the search, the trial judge accepted the officer's evidence as to why he opened the backpack. Although there was no evidence that the police had reasonable grounds to believe that the backpack contained contraband, evidence, or dangerous items – the officer was acting on a hunch – the judge found the search of it was authorized by exigent circumstances. "I find that while [the officer] had well founded concerns, they had not yet crystallized into reasonable grounds to believe the backpack contained evidence of criminal offences or something that might compromise officer or public safety," said the judge. "Out of an abundance of caution, in a dynamic and fast-moving situation, [the officer] decided to take a look. This was not for the purposes of investigating [the accused]. Instead, he wanted to ensure that the bag did not contain anything that could be harmful to any of the officers on the scene, or to the many people who would be in circulation in the building, emerging from their apartments to begin their day." The judge also "found that the police were obviously acting in the course of their duties when they responded to the 911 call and that the search of the backpack did not involve an unjustifiable use of powers in the circumstances." This was a non-invasive search prudently undertaken to ensure the

safety of all concerned, both civilians and police officers. Based on a combination of the doctrine derived from the exigent circumstances cases and the justifiable use of police powers cases, the judge concluded that the police did not violate the accused's s. 8 *Charter* rights. Even if he was wrong, the trial judge would have admitted the evidence under s. 24(2). The accused was convicted by a jury of possessing a loaded prohibited firearm and heroin.

The accused appealed her convictions to the Ontario Court of Appeal. Justice Rosenberg, writing the Court's decision, concluded that the search of the accused's bag could not be justified on the basis of exigent circumstances nor was it a justifiable use of police powers, or by combining the two concepts. In his view, the police only had the power to seize the bag until the situation was no longer in a chaotic state. Then, if there were no grounds to obtain a warrant to search the bag or consent was not obtained, it had to be returned to the accused. "While the burden of proof of a Charter violation is ordinarily on the accused, once the accused has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable within the meaning of s. 8. A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable," said Justice Rosenberg. "In this case, the only issue was whether the search of the [accused's] knapsack was authorized by law. As there was no statutory authorization for the search, any justification had to be found in the common law."

> "A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable."

Exigent Circumstances

Although exigent circumstances have been recognized at common law as a basis for searching without a warrant, there must be a risk of the imminent loss or destruction of evidence or contraband before a warrant could be obtained, or there must be a concern for public or police safety. With respect to the imminent risk of the loss or destruction of evidence underlying the exigent circumstances doctrine, the police would need reasonable grounds for the search, but because time does not permit the police to get a search warrant, they may proceed without one. Thus, "exigent circumstances do not justify a warrantless search for evidence or contraband on less than grounds for obtaining a warrant," said Justice Rosenberg. "It seems to me that at least when considering the loss or destruction of evidence, the exigent circumstances doctrine should be confined to cases where the officer had grounds to obtain the prior judicial authorization but could not do so because of the risk of imminent loss or destruction of the evidence."

> "[W]hen considering the loss or destruction of evidence, the exigent circumstances doctrine should be confined to cases where the officer had grounds to obtain the prior judicial authorization but could not do so because of the risk of imminent loss or destruction of the evidence."

With respect to a concern for the safety of the public or the police as a basis of exigent circumstances, something close to reasonable grounds appears to be a prerequisite to a valid search. For example, in the context of a field strip search for officer safety, reasonable grounds is a precondition. But there are other circumstances where the exigent circumstances doctrine is invoked to justify a search for the purpose of protecting the public or police officers on a lesser standard than reasonable grounds, such as an articulable cause or reasonable suspicion, as codified in s. 529.3(2)(a).

In this case, the doctrine of exigent circumstances could not justify the search of the knapsack. "The police did not have any grounds, let alone reasonable grounds, to believe that the knapsack contained evidence or contraband," said Justice Rosenberg. "As the trial judge put it, [the officer] was

acting on a hunch." Nor was it impractical to obtain a warrant; the police could have seized the bag until they obtained one. The accused had been removed from the scene and there was no imminent risk of loss or destruction of evidence. As for the safety branch of exigent circumstances, there were no grounds to believe that the knapsack contained anything that threatened the safety of the public or the police officers. Plus, the less intrusive procedure of simply seizing the bag until the situation had stabilized was available.

The Waterfield Test

There is a well-established doctrine recognizing the exercise of police powers that comply with the common law Waterfield test. Where the police conduct constitutes a *prima facie* interference with a person's property, the court will consider two questions:

1. Does the conduct fall within the general scope of any duty imposed by statute or recognized at common law?

2. Does the conduct involve a justifiable use of powers associated with the duty?

There was no doubt that the police were acting within the general scope of their duties to provide whatever assistance was required and to protect life when they attended at the apartment in response to the 911 call. However, Justice Rosenberg did not agree that the search of the accused's knapsack was a justifiable use of powers associated with this duty. The justifiability of an officer's conduct depends on a number of factors including the duty being performed, the extent to which some interference with individual liberty is necessitated in order to perform that duty, the importance of the performance of that duty to the public good, the liberty interfered with, and the nature and extent of the interference. "In this case, a search of [the] knapsack was not necessary and there were other reasonable alternatives by which the police could carry out their duties in response to the 911 call," said the Court of Appeal. The police could have seized the bag until they had ensured that the accused and her daughter and anyone else in the building were no longer in danger from the assailants. They could have returned the bag and let her go on her way, sought her consent to search it, or obtained a search warrant if they had the requisite grounds. She had been removed from the immediate area and the knapsack had been left where she had been told to drop it. There was nothing in the circumstances that necessitated searching the knapsack. So although the police had the power to forcibly enter the apartment to investigate the 911 call and to locate the assailants, their authority did not extend to opening the accused's bags and backpack:

> On the trial judge's findings of fact that [the officer] acted on a hunch, this search could not be justified on the Waterfield test. Vague concerns because of the confusing situation could not be used to justify an intrusion into the [accused's] privacy interest in her bags. Later in his reasons, … the trial judge referred to "well-founded" concerns and the officer's desire to ensure that the bag did not contain anything harmful. However, he made no finding that these concerns reached the level of reasonable necessity.
>
> Thus, the search in this case fails to meet the Waterfield tests on two grounds. It was not reasonable, since there were was no basis for believing that the safety of the public or the police was at risk. Second, the search was not reasonably necessary since there were other less intrusive measures that could have been used. [paras. 49-50]

Combining the Waterfield Test with Exigent Circumstances

While the doctrines of exigent circumstances and the Waterfield test can, in some circumstances, be related and may overlap, Justice Rosenberg found it preferable to keep them distinct in determining whether police conduct is justified. He continued:

> I say that primarily because of my concern that by combining the two there is a risk that the reasonableness requirement that lies at the heart of the s. 8 analysis may be weakened.

> The two doctrines are meant to address different concerns and are context-specific. Reasonableness in the exigent circumstances doctrine rests primarily on the fact that the officer did have grounds to obtain prior judicial authorization. The fact that it is not feasible to obtain a warrant merely sets the scene for possibly engaging the exigent circumstances doctrine, it does not justify the search. While there is a vague and ill-defined basis for search in exigent circumstances involving officer or public safety, even then there must be some reasonable basis for the search. Reasonableness in the Waterfield context rests on the reasonable necessity of the police action. Again, the fact that officers were acting generally in the course of their duties merely sets the scene; but is only one half of the test that must be met. By combining the two doctrines and taking only certain elements from each, the core safeguard of reasonableness may be lost. [paras. 51-52]

The Court of Appeal then summarized its view of the application of s. 8 of the *Charter* to this case:

- Exigent circumstances should be primarily reserved for cases involving imminent destruction of evidence or contraband and has largely been codified.
- The first branch of exigent circumstances, based on imminent destruction of evidence had no application, since the officer had no grounds to obtain a warrant.
- The second branch of exigent circumstances, based on police and officer safety could not apply since there was no finding of, at the very least, articulable cause; this branch has largely been overtaken by the Waterfield doctrine.
- The search in this case should have been analyzed through the Waterfield doctrine.
- While the 911 call and the chaotic circumstances gave the police grounds to temporarily seize the accused's bags, a search of them was not reasonably necessary within the meaning of the Waterfield doctrine.

Thus, the police had breached the accused's s. 8 right to protection against unreasonable search and seizure.

s. 24(2) of the Charter

Although the accused's rights were violated under s. 8, the Ontario Court of Appeal nonetheless admitted the evidence.

As for the seriousness of the *Charter* infringing conduct, the breach of the accused's rights was not serious and the police officer acted in good faith. Although he had a hunch that something was wrong with the backpack, he was also motivated by the need to return it to her so that she could be on her way with her daughter. His actions occurred in the confusion of the 911 call and the mistake he made was an understandable one. He went too far in opening the bag, but he was entitled to seize it until the scene had stabilized. Plus the limits of permissible investigative procedures in the course of responding to a 911 call were not entirely clear. As well, there were also extenuating circumstances; the officer was dealing with a chaotic situation in which the primary concern was for the welfare of the public and the police. This was not a case of flagrant disregard for *Charter* rights.

As for the impact of the *Charter* breach on the accused's Charter-protected interests, this was a serious intrusion into the accused's privacy; the backpack contained personal papers and her purse. The impact on the accused's privacy rights was, however, somewhat diminished.

As for the third branch of the 24(2) inquiry—society's interest in an adjudication on the merits—the firearm, ammunition and drugs were reliable evidence, a factor favouring admission. In this case, the factors relating to the seriousness of the breach and the reliability of the evidence favoured admission, while the impact on the accused's Charter-protected interests was serious and favoured exclusion. On balance, the repute of the justice system would not suffer from allowing the firearm and the drugs to be admitted in evidence. The accused's appeal from conviction was dismissed.

Complete case available at www.ontariocourts.on.ca

SAFETY CONCERN EXPLAINED WHY POLICE CALLED, BUT NOT WHY THEY SEARCHED

R. v. Stevens, 2011 ONCA 504

The accused and his girlfriend lived in an apartment. A dispute arose between the landlord and the accused's girlfriend over the failure to maintain the property and his girlfriend withheld the rent. The landlord obtained an eviction order, but the dispute was resolved through mediation. The landlord agreed not to enforce the eviction order if certain payments were made under a payment schedule. Although the first payment was made on time, the landlord, through inadvertence, commenced the eviction process by faxing instructions to a paralegal firm, which requested the sheriff's office to proceed. Two sheriff's officers attended at the apartment to enforce the eviction order and knocked at the door, but received no response. The superintendent opened the door with a master key and the sheriff's officers noticed two gun cases in one of the bedrooms. They did not know if the cases contained guns and did not touch them. They also observed an Ontario Provincial Police shirt, a police badge from a Prince Edward Island provincial police, and a bullet-proof vest (without panels). After satisfying themselves that the apartment was vacant, the officers signed the eviction order, the locks were changed, and the police were called while the superintendent and sheriff's officers waited inside.

When two police officers arrived, the sheriff's officers explained that they were executing an eviction order and told the police about the gun cases. The police opened the gun cases and found firearms that were not properly stored or locked. A decision was made not to search any further so a search warrant could be obtained while the officers waited in the apartment. When the accused arrived at the apartment, he was arrested as was his girlfriend who arrived some time later. A search warrant was obtained for the apartment and the police seized a number of items including firearms and ammunition.

At trial in the Ontario Court of Justice the accused's motion to exclude the guns and ammunition seized by the police was dismissed. The trial judge found that the sheriff's officers were proceeding under the authority of a valid eviction order and the police were initially assisting them in what was essentially a civil matter. The trial judge concluded that s. 8 of the *Charter* did not apply in the circumstances and the evidence was admitted. The accused was convicted on four counts of careless storage of a firearm and one count of careless storage of ammunition and he was given a suspended sentence and probation for 12 months.

The accused appealed his conviction to the Ontario Superior Court of Justice. The Crown conceded that the police were not exempt from the *Charter* when they assisted the sheriff's officers in carrying out an eviction. Since this was a warrantless search it was presumptively unreasonable. The appeal judge found that the police acted reasonably in the circumstances and that the presumption of unreasonableness was rebutted. She found "the police actions, including the securing of the apartment for several hours prior to the obtaining of the warrant, were both subjectively and objectively reasonable in the circumstances and not … intrusive in relation to the [accused's] privacy interests." She also found that "the Crown [had] satisfied the onus of demonstrating that exigent circumstances justified the entry by the police, the opening of the gun cases and the securing of the premises as they did, prior to obtaining the warrant." Furthermore, even if there was a s. 8 breach, the evidence was admissible under s. 24(2).

The accused then appealed to the Ontario Court of Appeal, arguing that both the sheriff's officers and the police officers carried out unlawful searches in violation of s. 8 of the *Charter*. Since sheriff's officers were state actors who perform their duties in these circumstances under the authority of various statutes, it was submitted that they were bound by the *Charter*. In the accused's view, the searches carried out by the sheriff's officers and the police officers constituted searches of his home and his belongings to which he had a reasonable expectation of privacy. He contended there were no exigent circumstances that justified the police

opening the gun cases before obtaining a warrant. In his opinion the evidence should have been excluded.

The Crown, on the other hand, suggested the sheriff's officers entered the apartment pursuant to their statutory duty to enforce a facially valid eviction order, which objectively diminished the accused's expectation of privacy in his apartment. The sheriff's officers were entitled to conduct a lawful search of the apartment to provide the landlord with possession of it, free of persons and pets. That search afforded them a plain view discovery of the two firearm cases and they were entitled to open them. The police entered the apartment with the implied consent of the landlord, who had re-acquired possession of the apartment through the eviction process. Further, since the landlord had come into possession of the accused's personal possessions by operation of law and the police had been called for assistance, the police had the implied consent of the landlord to open the two firearms cases in order to determine whether they posed a potential liability. Moreover, the Crown suggested, as the appeal judge concluded, that the admission of the evidence would not bring the administration of justice into disrepute.

"While the gun cases were in plain view, the guns were not."

An Unreasonable Search

Since the execution of the eviction order was the result of inadvertent and mistaken instructions given to the sheriff's officers by the landlord, the accused continued to have an objectively reasonable expectation of privacy in the apartment. He also retained his interest and privacy expectations in his personal property stored in it. "Assuming that the landlord were acting under a valid eviction order, his building superintendent was under an obligation to keep the [accused's] belongings in a nearby place for 48 hours to permit the [accused] to claim them," said Justice Armstrong. "In so doing, the landlord was required to respect the [accused's] privacy interest in his personal property. If the landlord had a duty to make an inventory of the [accused's] property, such a duty did not require the landlord to open the gun cases. A simple notation of 'two gun cases' would have been sufficient."

"The distinction has to be made between the right to be present and the right to search. The police had the former, but not the latter."

The "plain view" doctrine was also of no assistance. "While the gun cases were in plain view, the guns were not," said Justice Armstrong. The accused had a subjective expectation of privacy in the gun cases, which was objectively reasonable.

As for the sheriff's officers, they were state actors and their conduct was subject to *Charter* scrutiny. However, their conduct did not breach the accused's s. 8 rights. "The sheriff's officers were carrying out their statutory duties pursuant to an eviction order that was valid on its face," the Court stated. "Their role was to return the vacant premises to the landlord and it was within their authority to walk through the apartment and to check for people or animals. The sheriff's officers were not engaged in a criminal investigation and, more importantly, they did not open the gun cases. There was no unlawful search by the sheriff's officers."

As for the conduct of the police officers, it breached s. 8 of the *Charter*. Although the safety concern was sufficient to explain why the police were called, it was insufficient to justify why they opened the gun cases:

> There were no exigent circumstances and, in particular, no threat of a breach of the peace. There was no serious safety issue. When the sheriff's officers and later the police arrived, neither the [accused] nor his girlfriend were in the apartment. Once the locks had been changed, the [accused] could not access the gun cases. The safety concern, if any, was not genuine and immediate. The safety concern of the sheriff's officers, as found by the trial judge, was sufficient to explain why the police were consulted, but was not grounds for the police to open the cases. To the extent that the police were acting pursuant to their common law duty to preserve the peace and prevent crime, in the circumstances –

> particularly the absence of any urgency – this common law duty does not excuse the police from their obligations under the Charter.
>
> The landlord could not authorize the police to open the gun cases. Neither express nor implied consent of the landlord justified the police in opening the gun cases. The landlord could allow the police to enter the apartment and look around and while the gun cases were in plain view, the contents of the gun cases were not. As indicated, the Crown concedes that, at that point, the police had no basis to obtain a search warrant. The distinction has to be made between the right to be present and the right to search. The police had the former, but not the latter. [paras. 56-57]

The police officers, in opening the gun cases, amounted to a s. 8 breach.

s. 24(2) of the Charter

Seriousness of Charter Infringement: The search of the gun cases by police was without any lawful authority. "They did not have a basis for obtaining a search warrant before opening the gun cases and there were simply no exigent or pressing circumstances to justify their acting as they did," said Justice Armstrong. This factor favoured exclusion of the evidence.

The impact on the accused's Charter protected interests: The accused had a very high expectation of privacy in his home and in his personal property kept there. This factor also favoured exclusion.

Society's interest in an adjudication on the merits: The evidence was both reliable and critical to the prosecution's case. As for the seriousness of the offence, gun violence is very serious. But gun safety (like proper storage of firearms and ammunition), while important, is far less serious than violent crimes involving guns. Nonetheless, this factor favoured admission.

In balancing all three factors, the accused's privacy interest in the circumstances was paramount and the evidence was excluded. The accused's appeal was allowed, the evidence was excluded, his convictions were set aside, and verdicts of not guilty were entered.

Complete case available at www.ontariocourts.on.ca

'COMPUTER SYSTEM' INCLUDES TEXT MESSAGING

R. v. Woodward, 2011 ONCA 610

The accused was convicted of several sex related offences in the Ontario Court of Justice, including luring a child under the age of 14 for the purpose of facilitating the offence of sexual interference under s. 172.1 of the *Criminal Code*. In order to convict someone of an offence under s. 172.1(1), the communication in question must be through a means that satisfies the definition of "computer system" found in s. 342.1(2):

> "computer system" means a device that, or a group of interconnected or related devices one or more of which,
>
> (a) contains computer programs or other data, and
>
> (b) pursuant to computer programs,
>
> (i) performs logic and control, and
>
> (ii) may perform any other function.

The accused appealed his child luring conviction arguing, in part, that text messaging via cellular telephones did not satisfy the *actus reus* of communicating "by means of a computer system within the meaning of s. 342.1(2)." In his view, the specific wording used in the *Criminal Code* to define the term "computer system" and other related terms were not broad enough to apply to text messaging.

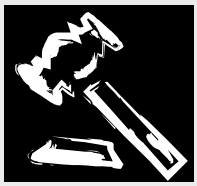
The Ontario Court of Appeal, rejected this argument. At trial there was evidence from a Corporate Security Manager at Bell Canada, who testified about the mechanics of text messaging. He explained how text messages are transmitted through Bell Canada's internal cellular telephone network. His evidence was that text messaging using cellular phones involves a group of interconnected devices, one or more of which contains computer programs, and that these computer programs perform logic and control functions in transmitting text messages, meeting the second element of the definition of computer system in s. 342.1(2). His evidence addressed the issues of "logic" and "control" and provided a basis for concluding that text messaging

using cellular phones was captured by the second part of the definition of "computer system".

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Search Warrant Grounds



"While each of these pieces of information comes with a caveat, the caveat sometimes amounting to a significant reservation, and sometimes being more in the nature of a quibble, nonetheless each of them adds something to the grounds. In my view, no single piece of information is sufficient, however, considered in total they are additive to the degree necessary for the conclusion that an authorizing Judicial Justice of the Peace could judicially assess them as amounting to reasonable grounds, or in other words, as providing a reasonable probability of discovery of evidence of the suspected offence; and in this case, that the residence likely housed a grow-op." - British Columbia Supreme Court Justice Grist, *R. v. Tran*, 2011 BCSC 838 at para. 21.

FLOWER BED INCLUDED WITHIN MEANING OF 'PREMISES'

R. v. Le, 2011 MBCA 83

Following the early morning shooting death of a man in the area of a nightclub, police obtained a warrant to search "the premises … at 39 Southlawn Stroll", which was co-owned by the accused and another individual. The Information to Obtain the search warrant stated that "things ... which will provide evidence of and relating to the said offence are concealed in the premises of 39 Southlawn Stroll." The search warrant identified the items to be searched for as a handgun, a sweatshirt, and a ball cap. In the appendix filed in support of the Information to Obtain, the police officer wrote:

> *I am requesting a Criminal Code Search Warrant to search the residence of 39 Southlawn Stroll Winnipeg Manitoba, including any outbuildings and garbage containers on the property. .... I believe, that there are reasonable and probable grounds to believe that Tam LE has stashed the firearm and clothing used during the murder of Miguel MONOZ [sic] in his residence 39 Southlawn Stroll Winnipeg. ....*

When the search warrant was executed no one was home. While a locksmith was picking the lock on the front door, a police officer went into the backyard and noticed a large granite rock near the rear fence. It appeared the rock had recently been moved out of the dirt in the flower bed. Suspicious that there might be something of significance under the rock, the officer used a pitchfork that was nearby to turn the rock over. He then saw what he thought was a black stick, flipped it with the pitchfork, and discovered it was a .38 calibre handgun. Police then discussed the meaning of the word "premises," as used in the warrant, and eventually concluded that the warrant included the yard. The gun was then photographed, removed from the soil, and seized. When it was discovered that the magazine was missing, a police officer ran his fingers through the soil and found the clip with a bullet inside about four inches or so below the surface of the ground and less than a foot away from where the gun was found. Police compared one of the bullets found in the victim's body with the handgun, discovering it was the murder weapon. The police also seized several documents from on top of the refrigerator in the kitchen of the house, which included a tax assessment and hydro account, all connecting the accused to the residence. As a result of this and other evidence, the accused was charged with first degree murder.

At trial in the Manitoba Court of Queen's Bench the accused argued that the police required a second warrant to disturb the soil of the flower bed. Furthermore, the accused submitted that the search warrant did not permit the police to seize the documents and, in doing so, violated s. 8. The trial

judge concluded that the scope of the warrant permitted the police to search the flower bed in the yard and found no *Charter* breach. The trial judge also concluded that the seizure of the various documents fell within s. 489(1)(c) of the *Criminal Code*. Since there was no *Charter* breaches, there was no need to use s. 24(2) and exclude the evidence. The accused was convicted of first degree murder and sentenced to life imprisonment without parole for at least 25 years. He then challenged his conviction to the Manitoba Court of Appeal arguing, among many grounds, that the search violated his s. 8 *Charter* rights.

Did "Premises" Include Flower Bed?

In this case, the search warrant was granted under s. 487(1) of the *Criminal Code* (*CC*), which, upon reasonable grounds, authorizes the search of a building, receptacle or place. The terms "building," "receptacle" or "place" are not defined in the *CC*, nor is the word "premises." It neither appears in s. 487 or the accompanying Form 1. Here, Chief Justice Scott, speaking for the Court of Appeal, identified the issue as "whether the warrant to search the 'premises' authorized the police to dig around in the flower bed." Because there was no express statutory definition for the word "premises," he looked to dictionary definitions and other legal cases, both criminal and non-criminal, to help define its scope. He also noted that the warrant was to search the "premises", or, as he noted,it was a "civic address warrant"; it was not a "dwelling-house" warrant:

> In my opinion, a review of the case law leads to the conclusion that the term "dwelling-house" is narrower than the term "premises." This also accords with common sense. In any event, even if it could be said that the warrant here was restricted to the [accused's] residence at 39 Southlawn Stroll, the curtilage principle can properly be relied upon to extend the scope of the warrant to include the land immediately surrounding the building, including the flower bed in the contiguous fenced backyard.
>
> In my opinion, it can safely be said that in Canada, a warrant for premises identified by a civic address includes, at the very least, the curtilage or grounds around the primary or main building on the property. On the facts here, this includes the flower bed located in the back of the fenced-in area, which the exhibits indicate could fairly be described as typical of many residential backyards found in the City of Winnipeg.
>
> The warrant here, in my opinion, extended to the flower bed. The search was not akin to a warrantless perimeter search or other warrantless entry into the [accused's] yard, as the [accused] argued. [paras. 93-96]

Furthermore, the police did not need a second warrant before conducting a physical search of the flower bed. "Where a s. 487 search warrant is already in place, the police are not required to obtain a second warrant to enable them to disturb the soil around an accused's home where the actual location of the digging is within the scope of the warrant," said Chief Justice Scott. "A second warrant authorizing a search of the flower bed here would have been 'absurd' and 'superfluous'."

> "[I]n Canada, a warrant for premises identified by a civic address includes, at the very least, the curtilage or grounds around the primary or main building on the property."

Meanings?

"premises" -

"a house or building, along with its grounds"
Black's Law Dictionary, 9th ed.

"curtilage" -

"the land or yard adjoining a house"
Black's Law Dictionary, 9th ed.

"an area of land attached to a house and forming one enclosure with it"
Oxford Dictionary of English

Chief Justice Scott summarized the case as follows:

> It is therefore my conclusion that:
>
> (1) the search warrant extended to the flower bed in the backyard of the property where the handgun was found, either through an interpretation of the term "premises" or an application of the curtilage doctrine; and
>
> (2) a second warrant was not required in order for the police to lawfully disturb the soil (that is, dig up the handgun clip from the flower bed). [para. 100]

Were Documents Lawfully Seized?

The warrant did not identify documentation linking the accused to the targeted premises, as one of the items to be searched for. However, when executing the warrant, the police seized several documents located on the top of the refrigerator. "There can be no doubt that the police, when executing a search warrant for specific items like guns or clothing, cannot rifle through personal papers at their discretion," said Chief Justice Scott. But in this case, the documents were properly seized under s. 489(1) (c) of the CC.

Seizure of things not specified

> s. 489. (1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, any thing that the person believes on reasonable grounds ... (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

Plus, the Court of Appeal noted, even if the documents were wrongly admitted as evidence it had no effect on the outcome of the trial. The accused's appeal was dismissed.

Complete case available at www.canlii.org

PLAIN VIEW OR NOT PLAIN VIEW: MORE DISCUSSION ON s. 489 CRIMINAL CODE

R. v. Bottineau & Kidman, 2011 ONCA 194

About two months after the starving death of a five year old boy and the grave mistreatment of his six year old sister, the police executed a search warrant at the accuseds' residence. They were common-law spouses and the grandparents of the children. The warrant authorized the police to seize notes prepared by the accused Bottineau, the grandmother, at a meeting held at the house. The police had reason to believe that the notes summarized statements made by various individuals who had attended the meeting. The police also had reason to believe that Bottineau was attempting to find out what the other residents in the house would say to the police and to formulate a consistent, exculpatory version of the relevant events.

Shortly after the search started, police found journals that recorded, in Bottineau's handwriting, the daily activities of the grandchildren over a considerable time period. Subsequent examination of the journals revealed entries that expressed negative feelings towards the children. The journals were used by experts to assess Bottineau's mental state as well as demonstrate evidence of animus she had towards the children. The accuseds were both convicted of second degree murder and forcible confinement. Bottineau received life imprisonment without parole ineligibility for 22 years, while her common law husband Kidman received life imprisonment without parole ineligibility for 20 years. They both appealed to Ontario's top court.

As part of the challenge to her conviction, Bottineau submitted that the police did not have authority either under the warrant or s. 489(2) of the *Criminal Code* to seize the journals. In her view, the seizure breached s. 8 of the *Charter*. Since the breach was serious and an important privacy interest was compromised, the evidence, she contended, should have been excluded under s. 24(2).

Although the seizure of the journals was not authorized under the terms of the warrant, an assessment of the seizure's legality turned on s. 489(2):

> Every peace officer ... who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds ... (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

"Section 489(2) does not authorize a search. It does, however, expand the seizure powers beyond the material identified in a warrant to, among other things, material that 'will afford evidence in respect of an offence'."

"Section 489(2) does not authorize a search," said the Court of Appeal. "It does, however, expand the seizure powers beyond the material identified in a warrant to, among other things, material that 'will afford evidence in respect of an offence'." Bottineau, however, argued that s. 489(2) was governed by the common law "plain view" doctrine, which imports strict preconditions. There is a requirement that "a seized article must be immediately obvious to the searching party and must have been discovered inadvertently." The Court of Appeal, however, disagreed. Section 489(2) is not simply a codification of the common law plain view doctrine:

> We are not convinced that the complexities of the plain view doctrine should be read into the language of s. 489(2). That language suggests that a determination of the lawfulness of the seizure of the journals would depend on whether the journals were found in the course of the search authorized by the warrant and fit the criterion in s. 489(2)(c). It appears to us that a strong case can be made for the contention that the journals were seized during the search and that there were reasonable grounds to believe they would afford evidence of an offence. [para. 77]

The Court went on to note that "if the journals were properly seized under s. 489(2), no case could be made out for their exclusion under s. 24(2) on the basis that the police did go beyond their powers by seizing other documents that were not covered under s. 489(2)." However, because the trial judge did not make a finding one way or the other about whether or not the seizure of journals went beyond the ambit of the warrant and s. 489(2), the Court of Appeal assumed the "best possible scenario" for the accused, that the journals were not properly seized and that they should have been excluded as evidence under s. 24(2). But even if the journals were improperly admitted into evidence, their admission had no impact on the verdict. The Crown's case was overwhelming and "the journals was but a small drop in a sea of evidence." The curative proviso could safely be applied.

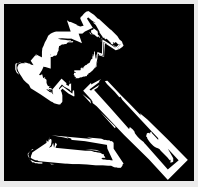
"The circumstances underlying this appeal are abhorrent beyond description. Cruelly, and without remorse, the [accuseds] starved their five-year old grandson, Jeffrey Baldwin, to death and gravely mistreated his older sister, Judy. ... '[T]his case involves the relentless pursuit of a course of unyielding inhumanity and degradation.'"

Ontario Court of Appeal

Complete case available at www.ontariocourts.on.ca

LEGALLY SPEAKING:

Sentencing A Police Officer



"The message must be clearly sent that police officers who knowingly engage in the types of activities committed by the Accused will face potentially severe penalties. The Accused knowingly embarked upon his predatory criminal activities with his eyes wide open. He must have clearly appreciated the potential for serious consequences for his conduct..." - British Columbia Provincial Court Judge Rideout, *R. v. Hodson*, 2011 BCPC 243 at para. 157 in sentencing former Vancouver Police Constable Peter Hodson to three years in a federal penitentiary for trafficking marihuana and two counts of breach of trust.

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